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No. 95-740

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In the Supreme Court of the United States

OCTOBER TERM, 1995

UNION SECURITY LIFE INSURANCE COMPANY, *Petitioner*

v.

EVELYN CROCKER, *Respondent*

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the $2 million punitive exaction in this case, which is at least 137 times the economic harm suffered by respondent, is so grossly excessive as to violate the Due Process Clause of the Fourteenth Amendment.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Union Security Life Insurance Company (hereinafter "Union Security")[1] respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Alabama in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama (App., *infra,* 1a-13a) is not yet reported. The orders of the Circuit Court of Choctaw County (App., *infra,* 14a-31a) are unreported.

JURISDICTION

The Supreme Court of Alabama issued an opinion in this case on July 14, 1995. After Union Security timely filed an application for rehearing, the Supreme Court of Alabama issued a modified opinion and overruled the application on September 8, 1995 (App., *infra,* 1a-13a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT

The Court has granted certiorari in *BMW of North America, Inc.* v. *Gore*, No. 94-896, to consider, among other things, whether the $2 million punitive damages award in that case is so excessive as to violate due process. The present petition raises a virtually identical issue. Accordingly, the Court should hold the petition for disposition as appropriate in light of its decision in *BMW.* See R. STERN, E. GRESSMAN, S. SHAPIRO & K. GELLER, SUPREME COURT PRACTICE § 4.16, at 192-193 (7th ed. 1993).

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[1] Union Security is a wholly owned subsidiary of American Security Insurance Company. Union Security has no subsidiaries.

1. *Union Security's Credit Life Insurance Business.* Union Security sells a range of credit-related insurance products, including group credit life insurance, the purpose of which is to pay off the balance of a loan in the event an insured debtor dies during the term of the loan. R. 374, 530.[2] Generally, group credit life is sold by the lender to the debtor pursuant to an agency contract with the insurance company. App., *infra,* 2a. During the time period relevant to this case, First Alabama Bank and its loan officers were authorized to sell group credit life on behalf of Union Security. App., *infra,* 3a; R. 302, 476.[3] The premiums for credit life insurance offered in Alabama by Union Security or any other insurer must be approved by the State of Alabama. R. 373.

During the period relevant to this case, Union Security required that all individuals seeking credit life insurance for First Alabama loans exceeding $10,000 fill out a one-page form entitled "Statement of Debtor's Physical Condition" (hereinafter "Health Statement"). App., *infra,* 3a; R. 483. The form, as it existed at the relevant time, asked whether the debtor had experienced any of the following nine conditions within the preceding five years: cancer, diabetes, epilepsy, high blood pressure, heart disease, respiratory disorder,

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[2] The designation "R. ___" refers to the Reporter's Transcript of the trial below. The designation "C. ___" refers to the Clerk's Record, which is comprised of pleadings, motions, memoranda of law, and trial exhibits. The designation "Supp. C. ___" refers to the Supplemental Record on Appeal, which is comprised of an affidavit made part of the record by the Alabama Supreme Court.

[3] First Alabama Bank is a state-wide bank that purchased Choctaw Bank in 1986 and merged operations with it in 1988. R. 734. Union Security's contract was with First Alabama Bank, but only First Alabama Bank of Choctaw was named as a defendant in this case. For purposes of this petition, the term "First Alabama" will refer to the broader entity, and the term "First Alabama, Choctaw" will refer to the specific defendant.

kidney disease, nervous disorder, and digestive disorder. For each condition, the form contained a box labeled "YES" and a box labeled "NO." For any "YES" answers, the form requested details of treatment, dates, diseases treated, and the treating physician's name and address. Directly beneath that disclosure section, the form contained the following certification: "I hereby declare that, to the best of my knowledge and belief, I am now in good health and that I have read the above questions and that the answers thereto are true and correct." Near the bottom of the page was a line for the debtor's signature. See C. 326.

It is Union Security's uniform policy to deny insurance to any debtor who has checked the "YES" box for any of the nine listed medical conditions. App., *infra,* 3a; R. 300-301, 342-343, 509, 522-523. On the other hand, if all nine "NO" boxes are checked, Union Security takes the applicants at their word and authorizes issuance of coverage. App., *infra,* 3a; R. 301, 304-305, 351-353.

Union Security does not conduct an independent investigation of the accuracy of the Health Statements before authorizing issuance of coverage (no doubt because the vast majority of Health Statements are accurate). App., *infra,* 3a; R. 305, 306.[4] If, however, the debtor dies within the policy's one-year contestability period,[5] and if the cause of death appears to be related to one of the conditions listed on

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[4] Union Security receives between 2,000 and 6,000 Health Statements per month. R. 299, 423. The cost of verifying each one of them would be prohibitive, especially when, as here, the premiums and benefits are relatively small.

[5] A contestability period is the amount of time in which an insurance company may contest the validity of the insurance contract based on misstatements on the application. If a policy has a one-year contestability period and the insured lives for more than a year after coverage commences, the coverage becomes incontestable without regard to whether the application contained any material misstatements.

the Health Statement, Union Security will investigate to determine whether the Health Statement contained material inaccuracies. App, *infra,* 3a; R. 306-308, 332-333. If it learns that the cause of death was the result of a pre-existing condition not disclosed on the Health Statement, Union Security denies the claim. R. 310, 312. If the cause of death is unrelated to any of the conditions listed on the Health Statement or if the death occurs outside of the one-year contestability period, Union Security pays the claim without further inquiry. R. 307, 349, 352.

The denial of a claim because of an undisclosed pre-existing condition is an exceedingly rare occurrence. In 1991, for example, Union Security received 134 claims on credit life coverage sold by First Alabama and denied only the one involved in this case. R. 998-1000. In 1992, it received 119 claims on coverage sold through First Alabama and paid all but one, which was a suicide excludible under the insurance contract. R. 1000, 1003. In 1993, it received 113 claims on coverage sold by First Alabama and paid all but four, two of which were suicides. R. 1003. Union Security's nationwide statistics are similar. In 1992, it received a total of 7108 claims and paid all but 91, 36 of which were suicides. R. 1014, 1024-1026. In 1993, it received 6998 claims and paid all but 89, 41 of which were suicides. R. 1025-1026. In other words, when suicides are excluded, Union Security's denial rate has been less than 1%.

2. *Coleman Crocker's Pre-Existing Medical Conditions And His Knowledge Of The Effect Of Those Conditions On His Insurability.* Respondent Evelyn Crocker is the widow of Coleman Crocker. Mr. Crocker was a smoker (R. 667) who suffered from Parkinson's disease throughout the 31 years that Mrs. Crocker had known him (App., *infra,* 4a; R. 566). In addition, Mr. Crocker had a history of heart disease. See generally App., *infra,* 4a; R. 352, 605-606. Specifically, in 1984 he was hospitalized and ultimately underwent a by-pass operation. R. 564-565. Then in 1988, he had to be carried

by ambulance to the Mobile Infirmary, where he underwent an emergency balloon angioplasty. R. 568-569, 593-594. In March 1989, he again had to be transported by ambulance to the Mobile Infirmary, where he had an angiogram performed. R. 595. Throughout this period, Mr. Crocker was on a variety of heart medications (R. 594-596) and was attended by at least half a dozen doctors (R. 600).

In 1988, the Crockers learned that Mr. Crocker's medical conditions would adversely affect his ability to obtain affordable insurance. At that time, their regular insurance agent, Larry Adams, discussed with them the possibility of changing policies. During that conversation, Adams asked Mr. Crocker various questions about his health. When he learned that Mr. Crocker was a smoker and suffered from heart disease, Adams advised Mr. Crocker against attempting to change policies. He told the Crockers that, as a result of the health problems, the premiums on any new policy would be too high. R. 662-663, 667-668.

3. *The Crockers' Purchase Of Credit Life Insurance From Union Security.* In October 1990, two years after learning about the difficulty Mr. Crocker would have in obtaining affordable insurance, the Crockers approached Samuel Taylor, the branch manager of First Alabama, Choctaw's Gilbertown branch, for purposes of obtaining a consolidation loan. App., *infra,* 3a; R. 536-537, 571. In conjunction with the loan, the Crockers decided to purchase credit life insurance. App., *infra,* 3a-4a.[6]

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[6] There is a dispute of fact as to whether Taylor told the Crockers that credit life was a requirement of obtaining the loan. Compare R. 514, 530-531, 541 (Taylor's testimony that he made no such statement and that whether or not the debtor purchases credit life is not a factor in determining whether to approve a loan) with R. 572, 575 (Mrs. Crocker's testimony that Taylor said that credit life was required). It is undisputed, however, that the Crockers had always purchased credit life insurance when they took out loans. R. 535-536, 570-571, 572-573, 612. It also is undisputed that the Crockers affirmatively wanted credit

Because the Crockers' loan was for more than $10,000, they each were required to execute a Health Statement as a prerequisite to obtaining credit life insurance through Union Security. Taylor accordingly filled out a Health Statement for each of the Crockers, checking each of the nine "NO" boxes to indicate that neither of them suffered from any of the listed medical conditions. App., *infra,* 4a.[7] At the closing, Taylor explained to the Crockers the nature of each of the documents they were signing, including the Health Statements. R. 509-510, 543, 575, 603-604. He did not rush them or otherwise prevent them from carefully reviewing the documents before they signed them. See R. 522, 542-543, 597-598, 610. Mr. Crocker nevertheless signed his Health Statement, which inaccurately reflected that he had not suffered either from heart disease or a nervous disorder. R. 511, 599-600, 606. Mrs. Crocker saw Mr. Crocker sign the document. R. 607.

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life for this loan without regard to Taylor's alleged representation. R. 572-573.

[7] There is a dispute of fact as to whether Taylor specifically asked the Crockers each of the health questions and then filled in the "NO" box for each question after receiving their negative responses. Compare R. 504-506, 522 (Taylor's testimony that he asked the Crockers the health questions and was told that they had none of the nine conditions) with R. 576-578 (Mrs. Crocker's testimony that Taylor never asked her husband the health questions). There also is a dispute of fact as to whether Taylor actually knew that Mr. Crocker indeed had suffered from both heart disease and a nervous disorder. Compare R. 523, 544-545, 555 (Taylor's testimony that, at the time he filled out the form, he had no recollection of Crocker having been ill in the past) with R. 589-592, 615 (Mrs. Crocker's testimony that Taylor knew that Mr. Crocker had suffered from heart disease) and R. 637-638, 640-641 (bank teller's testimony that she overheard Taylor discussing Mr. Crocker's heart condition with Mrs. Crocker two years prior to filling out the Health Statements). These disputes are beside the point here because there is no evidence either that Union Security had authorized Taylor to fill out the Health Statement without asking the health questions or that it had authorized him to fill out Health Statements inaccurately.

Because the Crockers had signed the Health Statements indicating that neither of them suffered from a pre-existing condition, Taylor was authorized to issue each of them a certificate of insurance summarizing the terms of the First Alabama group policy (R. 349, 442-443, 447)[8] and to add the one-time $1,659.61 premium to their indebtedness (R. 329, 512). Accordingly, as of the time of the closing, the total debt (including interest over the life of the loan) was $21,873. C. 298.[9]

Shortly after the closing, Taylor sent the Crockers the loan papers. R. 632. The Crockers did not read the loan papers or even check to see what was included in the package; they simply filed the papers away. R. 632-633. As it turned out, Taylor had not sent them their certificates of insurance. R. 327-328, 544. Unbeknownst to Union Security (and in direct contravention of its expectations (see R. 326-327, 448) as well as those of First Alabama (see R. 746-747)), the president of First Alabama, Choctaw had made the unilateral decision not to send certificates of insurance to covered debtors and therefore not to provide such certificates to First Alabama, Choctaw's branch offices (R. 747-748). Nevertheless, as far as Union Security was concerned, coverage was in force. R. 349.

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[8] The opinion below contains a statement to the effect that Union Security does not issue policies to its insureds. See App., *infra*, 3a. Although technically correct (in the context of group policies), that statement conveys the inaccurate impression that Union Security does not provide certificates of insurance.

[9] The opinion below mistakenly states that Taylor received a commission from Union Security for the sale of credit life insurance to the Crockers and others. See App., *infra*, 3a. The record does not support that statement. Although Taylor received the modest sum of between $600 and $800 annually from the sale of credit life insurance (see R. 540), the record reflects that those amounts were paid by First Alabama pursuant to its "Credit Life Incentive Plan" and subject to a maximum set by Alabama banking regulations (see C. 328-330).

4. *Mr. Crocker's Death and the Denial of Mrs. Crocker's Claim.* On August 28, 1991, approximately nine months after the closing, Mr. Crocker died of a heart attack. The official cause of death was "acute myocardial infarction/coronary artery disease." C. 307. Mrs. Crocker then made a claim for the $14,563 remaining on the loan. App., *infra,* 4a; R. 629-630; C. 306. As part of the process of making a claim, Mrs. Crocker provided Union Security with the death certificate. App., *infra,* 4a; R. 513-514, 548. Because Mr. Crocker had died within the policy's one-year contestability period and because the cause of death was related to one of the conditions listed on the Health Statement, Union Security investigated the claim. R. 351. Its designated representative contacted the office of the doctor who signed the death certificate and learned that Mr. Crocker had been suffering from heart disease at the time he signed his Health Statement. R. 321, 351-352; C. 304. On the basis of that information, Union Security denied Mrs. Crocker's claim and informed her that the portion of the premium attributable to Mr. Crocker would be refunded. App., *infra,* 4a; C. 318. Union Security instructed First Alabama, Choctaw to make the refund. R. 346-347, 739. Unfortunately, for unknown reasons, First Alabama, Choctaw did not immediately make the refund as instructed. R. 739. After suit was filed and the president of First Alabama, Choctaw learned that the refund had not been made, the bank credited the premium amount plus interest against the loan balance. R. 739-740, 742-746.

5. *Proceedings Below.* Following Mr. Crocker's death, Mrs. Crocker ceased making payments on the loan. After she was four months in arrears, First Alabama, Choctaw sent her a collection notice. R. 744. Mrs. Crocker subsequently filed suit in Choctaw County against First Alabama, Choctaw and Union Security. Her amended complaint alleged that Taylor, as agent for both First Alabama, Choctaw and Union Security, had misrepresented to the Crockers that, in the

event Mr. Crocker died, the credit life insurance would pay off the balance of the loan. The amended complaint also alleged that Taylor "concealed" from the Crockers the fact that he was disclosing inaccurate information on the Health Statement, that they had to be in good health to get the insurance, and that, if Mr. Crocker were to die of heart problems or a nervous disorder, coverage would be denied. C. 180.

The case went to trial on February 14, 1994. At trial, there was no evidence that Union Security had authorized Taylor or any other agent to fill out health statements inaccurately. Nor was there any evidence that Union Security had instructed Taylor or any other agent to "conceal[]" the fact that inaccuracies on a health statement could result in denial of a claim. Instead, the evidence of wrongdoing focused exclusively on Taylor (and to a limited extent on First Alabama, Choctaw). At the same time, however, Mrs. Crocker's counsel salted the trial with evidence of Union Security's out-of-state location, its foreign ownership, and its sizeable aggregate premiums (over the entirety of the contract with First Alabama) and low loss ratios for credit life insurance sold through First Alabama. R. 294, 297, 365-371, 420-422, 442; C. 313-316.[10] Much of that evidence was introduced over Union Security's objection. See R. 361-363, 421, 422.

During summation, Mrs. Crocker's attorneys repeatedly reminded the jury of these irrelevant, yet highly inflammatory facts. Thus, within seconds of beginning his summation, one of Mrs. Crocker's counsel stated gratuitously: "The home office of Union Security is in Atlanta and some other thing over across Europe or somewhere, owns them or something."

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[10] A loss ratio is the percentage of annual earned premiums paid out in claims. R. 366. It does not take into account the costs of selling and servicing the insurance policies and so is *not* a measure of the profitability of that line of insurance.

R. 822. And, more dramatically, one of Mrs. Crocker's other attorneys made the, by-now classic, "send a message" speech, complete with "us-against-them" rhetoric :

> [H]ere's what's going to happen. There's going to be a phone call made. As soon as your verdict comes in, **there will be a phone call to Atlanta; there will be a phone call to Europe**, and it's one of two things: Boys, its back to business as usual. That jury didn't understand. We were able to skillfully confuse them enough. Or, there is another message. It's very simple also: Boys, in **a small county, in a small state**, we got caught cheating, stealing, and lying. We better put a stop to this.
>
> Very simple. You can't help the message. It's going out. **The message is going straight to Atlanta, then straight to Europe**. The question, the only thing you can control, is the contents of that message.

R. 900-901 (emphasis added). See also R. 889.

The same attorney repeatedly reminded the jury of the total amount of premiums generated from the sale of credit life insurance over the course of Union Security's contract with First Alabama, as if the sale of that product was itself the tort for which punishment was being sought. See R. 894-896.

After summations, the case was submitted to the jury against both defendants. After deliberating a mere 36 minutes (see R. 927-928), the jury returned a general verdict, holding the defendants jointly and severally liable in the amount of $5 million. R. 929; C. 735.

Both defendants filed motions for judgment n.o.v., new trial, and remittitur. After conducting a post-trial evidentiary hearing pursuant to *Hammond* v. *City of Gadsden,* 493 So. 2d 1374 (Ala. 1986), the trial court sustained the jury's finding

of liability and rejected the defendants' various grounds for a new trial. App., *infra,* 14a-27a. Finding the $5 million verdict excessive, however, the court indicated that it would grant a new trial unless Mrs. Crocker agreed to a remittitur of $2 million. *Id.* at 26a.

The trial court expressly recognized the extraordinary nature of the jury's verdict, stating (App., *infra,* 15a):

> February 17, 1994, will long remain as a day of demarcation for the assessment of damages by juries in lawsuits tried in Choctaw County, Alabama, for the verdict in this case is far in excess of any previously awarded.
>
> The reverberations resulting from the jury verdict in this cause will be long lasting throughout the local legal community and the county. When the verdict was read, gasps were heard, sobs sounded, hearts pounded loudly (some from glee, others from alarm), for from this day forward, it would forever be remembered that large punitive damage awards were alive and well, not only in Alabama, but, for the first time, in Choctaw County.

In reviewing the size of the punitive damages award, the trial court noted that "[t]his case involved misrepresentations made *by the agent* for defendants as well as concealment *by the agent* of material facts from the plaintiff and her deceased husband in the purchase of credit life insurance." App., *infra,* 19a (emphasis added). In other words, the defendants were held liable under a theory of vicarious liability; there were *no* direct actions on the part of Union Security that were the basis for liability. The court further observed:

> This appears to be an isolated incident insofar as both defendants are concerned in failing or refusing to pay a credit life insurance claim premised upon the fraud of their agent. **There is no evidence either defendant engaged in similar misrepre-**

> **sentations or concealments/suppressions in their dealings with other credit life insureds.** In other words, there is no evidence of repeated similar wrongs being committed by either of the defendants. This factor mitigates against the award of very significant punitive damages being assessed against the defendants.

Id. at 20a (emphasis added). See also *id.* at 23a ("[T]his Court has found no repeated wrong-doing by either defendant. This was an isolated incident."). The court also noted that, even before Mrs. Crocker had filed her claim, Union Security had revised the Health Statement to include the specific admonition that "Untruthful answers may result in denial of claims." *Ibid.* (quoting revised Health Statement).

Despite these various mitigating factors, however, the trial court concluded that a punitive award of $3 million was not excessive under the circumstances. The court based that conclusion principally upon its findings that (1) Mrs. Crocker had suffered "grievous" harm because "all the expectations for which [she] and her deceased husband had bargained and paid for, totally failed" and (2) in 1991 Union Security realized a net gain of $1.29 million from the sale of credit life insurance nationwide. App., *infra,* 20a, 21a.

After both defendants filed notices of appeal, First Alabama, Choctaw entered into a pro tanto settlement with Mrs. Crocker, pursuant to which it paid her $1 million. App., *infra,* 2a. Union Security then successfully moved for a remand to the trial court for purposes of determining whether a punishment of $2 million (*i.e.*, the remainder of the judgment) was excessive in relation to Union Security's conduct, particularly in view of the lesser amount paid by its more culpable co-defendant. The trial court declined to conduct a new hearing, instead issuing a short order holding that $2 million was not excessive as to Union Security. App., *infra,* 28a-31a.

A five member panel of the Alabama Supreme Court then affirmed in all respects. App., *infra,* 1a-13a. The court rejected Union Security's argument that the evidence did not support the finding of liability for the underlying tort, stating that "the jury could reasonably find that Taylor had a duty to disclose to the Crockers that the policy benefits might not be paid if Mr. Crocker in fact had had health problems and that his failure to do so induced them to obtain the credit life coverage, for which premiums were paid until coverage was denied at Mr. Crocker's death." App., *infra,* 6a.

The Alabama Supreme Court also upheld the trial court's conclusion that a $2 million punishment against Union Security was not excessive. It explained: "The trial court's order reflects a thorough analysis of the jury verdict and, after an exhaustive review of the record, we agree that the punitive damages award, after remittitur, does not exceed the amount necessary to promote society's goals of punishment and deterrence, in order to exorcise fraud and inequity from the marketing of credit life policies." App., *infra,* 11a-12a.

In concluding that Union Security's conduct needed to be "exorcise[d]," the court relied entirely upon observations it had made in *Huff* v. *United Ins. Co. of Am.*, 1995 WL 317676 (1995), which was decided more than 3½ years *after* Union Security had denied Mrs. Crocker's claim. The court stated in *Huff:*

> *As the law in Alabama currently stands,* an insurance company may issue a life insurance policy with its knowledge of its applicant's health coming solely from its agent's questioning of the applicant about his or her health history. The benefits from this type of transaction lie solely in favor of the insurance company and its agent. The insurance company receives premiums month after month, while the agent retains a commission from the sale. But when the insured dies, the insurance company refuses to pay the benefits provided by the policy.

> Its refusal is based upon its discovery, for the first time, that the insured's health was poor. When the policy is sold, an agent is not required to delve thoroughly into the applicant's background for the details of his health history. Such a requirement could prevent situations like the one in this case.

App., *infra*, 12a (quoting *Huff*, 1995 WL 317676, at *2) (emphasis added).[11]

Union Security timely filed an application for rehearing, which was overruled on September 8, 1995. App., *infra*, 13a. After the Alabama Supreme Court denied a stay of execution of the judgment, this Court granted a stay pending the timely filing and disposition of a petition for writ of certiorari. See 64 U.S.L.W. 3269 (Oct. 10, 1995).

REASONS FOR GRANTING THE PETITION

The petitioner in *BMW* argues that the $2 million punitive exaction in that case is disproportionate to the potential and actual harm suffered by the plaintiff and bears no reasonable relationship to the gravity of its alleged misconduct. The instant case presents an equally, if not more, extreme example of a punitive judgment that cannot be justified by these or any other relevant criteria.

To begin with, one would be hard pressed to read the opinion of the Alabama Supreme Court and conclude that

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[11] We cannot help observing at this point that the Alabama Supreme Court appears to have overlooked entirely the fact that, under Alabama law, ordinary life insurance policies are incontestable after a maximum of two years (see Ala. Code § 27-15-4) and that credit life insurance polices are incontestable after only one year (see Ala. Ins. Reg. No. 28, § VI(J)(2)). When a policy contains a short contestability period, the "benefits" of taking the policyholder at his or her word do not "lie solely in favor of the insurance company and its agent." To the contrary, dishonest policyholders have a tremendous incentive to lie on their health statements, knowing that their fraud will be rewarded if they can survive the short contestability period.

Union Security did anything wrong at all, let alone something that warrants a $2 million fine. There was no evidence in this case that Union Security authorized Taylor or any other agent to falsify Health Statements. Nor was there evidence that it instructed Taylor or any other agent to suppress the (seemingly obvious) fact that, if the insured signs a Health Statement that fails to disclose a pre-existing condition, his or her claim might be denied.[12]

The *only* conduct of Union Security with which the Alabama Supreme Court found fault was its practice of investigating those claims made during the one-year contestability period that appear to be related to a condition listed on the Health Statement. See App., *infra,* 12a. That was not one of Mrs. Crocker's theories of liability, however. Her amended complaint alleged misrepresentation and concealment only (see C. 180) and the case was submitted to the jury on those theories alone (see R. 904). Moreover, as the Alabama Supreme Court recognized, Union Security's practice simply was not wrongful in Alabama at the time Mrs. Crocker made her claim. App., *infra,* 12a.[13] It is the

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[12] To the extent a fraud was committed at all in this case, Union Security was the *victim,* not the perpetrator. Union Security has nothing to gain, and much to lose, when a Health Statement fails to disclose a pre-existing medical condition. Whenever a claim is made outside of the one-year contestability period, it is obligated to pay the claim regardless of whether the cause of death was related to an undisclosed pre-existing condition. And, if the claim is made within the contestability period and denied because of a false or inaccurate Health Statement, the premium is refunded.

[13] To the contrary, Alabama law expressly provides (although it presumably no longer means) that insurers may deny coverage because of misstatements or omissions in the application if (1) the misstatements or omissions are "[f]raudulent"; (2) the misstatements or omissions are "[m]aterial either to the acceptance of the risk or to the hazard assumed by the insurer" or (3) "the insurer would not have issued the policy had the application been accurate." Ala. Code § 27-14-7. Courts

height of unfairness, not to mention irrationality, to justify a multi-million dollar sanction by reference to conduct that was lawful at the time it took place.[14]

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construing this provision have concluded that, with limited exceptions, it permits insurers to rely on the truthfulness of the applicant's answers to health questions and to defer investigation until a suspicious claim is made. See, *e.g.*, *Stephens* v. *Guardian Life Ins. Co.*, 742 F.2d 1329, 1334 (11th Cir. 1984) ("[i]nsurers are not required to investigate when the information furnished by the insured reveals nothing out of the ordinary"). The regulation that makes credit life insurance coverage incontestable after one year (Ala. Ins. Reg. No. 28, § VI(J)(2)) is confirmation that, during the first year of a policy, there is nothing unlawful about denying a claim based on misstatements in the application that were not discovered until the claim was made.

[14] Finally, it merits mention that the practice condemned by the Alabama Supreme Court is both economically efficient and eminently sensible. If it is not permissible to defer investigating until the time a suspicious claim is made, Union Security (and numerous other similarly situated insurers) would be left with three equally undesirable options. It could, before issuing coverage, independently verify the accuracy of every one of the 2,000 to 6,000 Health Statements that it receives each month, an extremely costly and time-consuming proposition that would likely necessitate an increase in premiums paid by all debtors, including the overwhelming majority who are honest. Alternatively, Union Security could simply pay all claims, regardless of whether the cause of death appears related to an undisclosed pre-existing condition. That option too would likely cause an increase in premiums and would surely provide an incentive for more people to falsify health statements. Finally, it could simply stop issuing policies that generate premiums so modest as to make it infeasible to investigate the applicant's health before issuing coverage.

We might add that the Alabama Supreme Court's antipathy toward Union Security's approach is particularly misguided in the context of credit life insurance. Unlike ordinary life insurance, time is often of the essence in the credit life context. A person seeking a loan (and credit life) to buy a house, a car, or an engagement ring may not have the time for the insurer to complete a thorough investigation (the timing of which could be largely determined by the responsiveness of the applicant's physician).

In addition to bearing no reasonable relationship to the gravity of the alleged misconduct, the $2 million punishment in this case is entirely disproportionate both to the actual and potential harm to Mrs. Crocker and to whatever "profit" that Union Security could be said to have earned.

As for the harm to Mrs. Crocker, it bears noting at the outset that, if the Health Statement had been accurate, Union Security simply would not have issued coverage. App., *infra,* 3a; R. 342-343, 509, 522-523. It is conceivable that some other insurer might have issued coverage at a rate that would reflect the risk to that insurer, but there is no evidence in this case that insurance would have been available at any price or that, if such insurance were available, the Crockers would have been willing to pay what it would have taken to obtain it. Accordingly, the $14,563 loan balance would appear to overstate Mrs. Crocker's harm. Putting this problem to one side, however, the punitive damages imposed against Union Security alone are **137** times the amount remaining due on the loan.

There also is good reason to conclude that the approximately $830 premium paid on behalf of Mr. Crocker overstates the harm to Mrs. Crocker since Union Security instructed First Alabama, Choctaw to refund that premium (R. 346-347, 739), and First Alabama, Choctaw ultimately did so (R. 739-740, 742-746). Putting that point aside, however, the punitive damages are over **2,400** times the premium attributable to Mr. Crocker and are over **1,200** times the total joint premium paid by the Crockers.

The trial court did suggest that Mrs. Crocker suffered "grievous" harm as a result of the failure of her expectations. App., *infra,* 20a. However, there was no testimony whatever about mental anguish and no attempt on the part of Mrs.

Crocker to quantify the value of her failed expectations.[15] Accordingly, there is no basis in the record for assuming that Mrs. Crocker suffered (and that the jury awarded) any significant amount of "failed expectation" damages, and hence there is nothing to render less startling the ratio of punitive damages to the actual or potential harm to Mrs. Crocker. Contrast *TXO Prod. Corp.* v. *Alliance Resources Corp.*, 113 S. Ct. 2711, 2722 (1993) (referring to "record evidence" that would support a finding that the potential harm to the respondent could have ranged from $5 million to $8.3 million).

The punitive damages also are totally disproportionate to whatever gain Union Security could be said to have earned as a result of the sale of insurance to the Crockers. The record contains evidence that Union Security receives only 4% of the premium for credit life coverage sold through First Alabama (with the remainder going to First Alabama). Supp. C. 5. See also R. 354-355 (testimony of Union Security's claims manager that Union Security receives 6% and that First Alabama receives whatever is left after expenses and the payment of claims). In other words, on the sale of the Crockers' joint coverage, Union Security earned a whopping $66.38. The $2 million punitive exaction is more than **30,000** times that figure. Although First Alabama, Choctaw's president testified (inaccurately) that Union Security gets about 50% of the premium (see R. 722-723), that testimony does not alter the fact that the punitive damages bear no relationship to Union Security's income from the sale of credit life insurance to the Crockers. Even assuming that Union Security received 50% of the premium, the punitive damages are a breathtaking **2,400** times that amount.

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[15] We note in this regard that one of Mrs. Crocker's lawyers has been making her loan payments since shortly after she received the collection notice from First Alabama, Choctaw (R. 631) and that there is no evidence in the record that she incurred any penalties or additional interest charges as a result of having been in arrears.

The trial court observed that the punitive damages were not disproportionate to the $1.29 million net gain earned in 1991 by Union Security from the sale of credit life insurance nationwide. App., *infra,* 21a. But that observation only serves to demonstrate why the punitive damages are utterly unsustainable. As the trial court recognized, the tort here was "an isolated incident." *Id.* at 20a, 23a. As such, it is irrational to compare the punitive damages to Union Security's total annual net gain from the perfectly lawful activity of selling credit life insurance.

Even if it ordinarily might be appropriate to consider total net revenues notwithstanding the absence of proof that the tort was more than an isolated incident, it is undisputed here that Union Security pays over 99% of the non-suicide claims it receives. R. 998-1000, 1003, 1014, 1024-1026. Accordingly, it is inappropriate to treat the entire $1.29 million in net earnings as ill-gotten gains. Given the 99% payment rate, the *most* that even arguably could be used for a comparison based on 1991 profits would be $12,900. The punitive damages are **155** times that amount.

Of course, we wholeheartedly agree with the petitioner in *BMW* that it is inappropriate to punish for out-of-state transactions under Alabama law and hence that it is inappropriate to evaluate a punishment with reference to out-of-state profits. The record reflects that Union Security earned only $67,019 in 1991 from the sale of credit life through First Alabama. Supp. C. 5.[16] The punitive damages are roughly **30** times that amount. And, if that figure is reduced to reflect

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[16] There is no evidence in the record as to what Union Security earned through all Alabama agents.

the 99% payment rate, the punitive damages would be 3,000 times the resulting $670.19 figure.[17]

In short, the conduct here was not wrongful, let alone egregious, and the punishment bears no reasonable relationship to either the harm to Mrs. Crocker or the "gain" to Union Security. Because the case is, in these respects, quite similar to *BMW*, the Court should hold Union Security's petition and dispose of it as appropriate in light of its decision in that case. If the Court does not reach the excessiveness issue in *BMW*, we respectfully submit that this case would be an excellent one in which to address that exceedingly important and recurring issue.

CONCLUSION

The petition for certiorari should be granted.

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[17] By making these comparisons, we by no means accept the contention that it is appropriate to punish in one case for the effect of a defendant's conduct on other individuals who have the right to bring their own cases. Like the petitioner in *BMW*, we believe that whatever punishment is appropriate for the scope of the defendant's conduct should be apportioned across the total number of potential plaintiffs so as to avoid both duplicative punishment and the unfairness of making a defendant, who might be exonerated in other cases, pay a statewide (or nationwide) punishment in the first case in which it is held liable.

Respectfully submitted.

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NOVEMBER 1995

APPENDIX A

UNION SECURITY LIFE INSURANCE COMPANY

v.

Evelyn CROCKER.

No. 1931672.

Supreme Court of Alabama.

Sept. 8, 1995.

BUTTS, JUSTICE.

Evelyn Crocker, individually and as the beneficiary and administratrix of the estate of Coleman S. Crocker, sued Union Security Life Insurance Company ("Union Security") and First Alabama Bank of Choctaw ("First Alabama"), alleging claims of fraud, concealment, breach of contract, bad faith, and a scheme to defraud, in relation to First Alabama's sale of credit life insurance policies and Union Security's failure to pay benefits under those policies. Mrs. Crocker subsequently amended her complaint to reflect that she was proceeding only in an individual capacity and not as the the beneficiary and administratrix of the estate of Coleman S. Crocker.

Mrs. Crocker alleged that Sammy Taylor, as an agent for both First Alabama and Union Security, induced her to buy a credit life insurance policy on the life of her husband although he knew that Mr. Crocker had a history of heart problems and was uninsurable. She further alleged that Taylor failed to ask the Crockers for medical information and that Taylor falsified the information he put on the credit life insurance application. Mrs. Crocker also alleged that, after her husband's death, Union Security breached its contract of insurance by failing to pay benefits and that this failure was part of a scheme of intentional fraud in relation to the selling of credit life policies.

The trial court dismissed the breach of contract and bad faith claims, and the fraud claims went to trial. The jury

returned a verdict of $5 million for Mrs. Crocker, and the trial court entered a judgment upon this verdict. Both First Alabama and Union Security moved for a J.N.O.V., a new trial or, in the alternative, a remittitur, and moved to stay execution of the judgment until their post-judgment motions were ruled upon. After a hearing, the trial court denied the defendants' J.N.O.V. motion and further denied the defendants' motion for new trial, subject to Mrs. Crocker's acceptance of a $2 million remittitur. Mrs. Crocker accepted the remittitur, and Union Security alone appealed.

During the pendency of this appeal, Mrs. Crocker entered into a pro tanto release with First Alabama, accepting $1 million in exchange for releasing First Alabama from any further liability in the case. When Union Security discovered this agreement, it filed in this Court a motion for an "emergency remand," arguing that the verdict was excessive against it as the sole remaining defendant and demanding a hearing in the trial court on the matter. This Court initially denied the motion, but later, after reconsideration, granted it and remanded the case for the circuit court to review the judgment for excessiveness, in accord with *Hammond* v. *City of Gadsden*, 493 So.2d 1374 (Ala. 1986), and *Green Oil Co.* v. *Hornsby*, 539 So.2d 218 (Ala. 1989). On remand, the circuit court entered an order reaffirming its original *Hammond* order, without conducting a second hearing. Union Security's appeal on the merits was then returned to the active docket of this Court.

I.

Union Security, which is headquartered in Atlanta, Georgia, and which is part of a European holding company, sells credit life insurance through lending institutions nationwide, including First Alabama. Various First Alabama loan officers are contractually authorized in this state to take applications for credit life insurance from their customers and to issue certifications of insurance for approved applications, showing that the coverage is in effect.

Union Security requires that, for credit life policies issued in conjunction with First Alabama loans in excess of $10,000, the customer execute a "Statement of Debtor's Physical Condition" before credit life coverage is issued. This health disclosure statement authorizes Union Security to receive any information related to the health, medical history, diagnosis, treatment, employment, or financial condition of the applicant, as long as this information is for the purpose of evaluating or underwriting the application for credit life coverage.

The health disclosure statement has nine boxes to be checked "yes" or "no" in response to specific questions concerning the applicant's medical history. Union Security requires that all of these boxes be checked "no," indicating that the applicant has had no prior history of particular illnesses before it will issue credit life coverage for the applicant. Union Security does not examine the health records of those applicants who indicate on the health disclosure statement that they have no history of a particular illness or health condition. Union Security does, however, reserve the right to examine applicants' health records to determine "after the fact" whether coverage should have been issued. Union Security does not issue a written policy to those applicants who are accepted for coverage.

In October 1990, Union Security was selling credit life insurance in conjunction with loans made by First Alabama in Choctaw County, Alabama. Union Security authorized Sammy Taylor, a First Alabama branch manager in Choctaw County, as its agent to offer the coverage to loan applicants, and it paid him a commission of the premiums on the credit life policies that it issued pursuant to the applications he obtained.

The Crockers knew Taylor and contacted him at the bank to inquire about obtaining a consolidation loan. Taylor advised Mrs. Crocker to pick up an application from the bank and complete it; they picked up one and then they met with

Taylor. During this meeting, Taylor completed a separate health disclosure statement for each of the Crockers. He had premarked each of the nine health questions on the statements by checking the "no" boxes, indicating that neither of the Crockers suffered from any past illnesses. Mr. Crocker, however, had been suffering from Parkinson's disease for some years and had also undergone serious heart surgery twice within the last 10 years. The Crockers signed the respective health disclosure statements that Taylor had prepared for them.

Mr. Crocker died from heart disease in August 1991. Mrs. Crocker submitted a death certificate to Union Security and attempted to collect the credit life policy benefits. Union Security investigated the claim and denied coverage, based on Mr. Crocker's history of heart disease.

II.

The first issue presented is whether the trial court erred in denying Union Security's motions for a summary judgment and a directed verdict on Mrs. Crocker's two claims involving alleged misrepresentation and concealment by Taylor. Union Security points out that Mrs. Crocker was required to establish (1) that Taylor had a duty to disclose an existing material fact; (2) that Taylor suppressed that fact; (3) that Taylor had actual knowledge of the fact and of its materiality; (4) that Mrs. Crocker's lack of knowledge of the material fact induced her to act; and (5) that she suffered actual damage as a proximate result. *Hardy* v. *Blue Cross & Blue Shield of Alabama*, 585 So.2d 29 (Ala. 1991).

The existence of a duty to disclose is a legal question and is to be discerned from the confidential relations of the parties or from the particular circumstances of the case. Ala. Code 1975, § 6-5-102; *Interstate Truck Leasing, Inc.* v. *Bender*, 608 So.2d 716 (Ala. 1992). Some factors the court may consider are the relationship of the parties, the value of the particular facts, and the relative knowledge of each party.

Bender. Where the accused has superior knowledge of the fact and the other party is being induced to take action that that party might not have taken had he or she known the fact, the obligation to disclose is particularly compelling. *Bender*.

The evidence shows that at the time he prepared the Crockers' health disclosure statements, Taylor had been acting as the agent for Union Security in the sale of credit life policies for many years and was quite knowledgeable about the qualifications an applicant must have in order to obtain credit life coverage. Taylor testified that he knew that if he indicated on the application form that Mr. Crocker suffered from any health problems, the credit life policy would not be issued to him. Taylor stated that he knew the credit life policy included a one-year period wherein Union Security could investigate the Crockers' medical history after issuing the policy, even if it had not done so before issuing coverage. Taylor testified that he received a commission from each credit life policy that was issued, regardless of whether the company ultimately paid benefits to the insured or not.

Although Taylor denied knowing that Mr. Crocker had a history of heart disease, other witnesses testified that Taylor did know of Mr. Crocker's past heart surgeries and had inquired about his condition during his periods of convalescence. Although Taylor denied knowing that Mr. Crocker suffered from Parkinson's disease, the evidence shows that Mr. Crocker had experienced constant and noticeable tremors for years and had displayed this symptom of the disease on the day Taylor filled out the application for credit life insurance. There was also evidence that Taylor and his wife had vacationed with the Crockers and that they had visited them in their home during the years that Mr. Crocker suffered from heart disease and Parkinson's disease. In spite of this, Taylor nevertheless indicated on the health disclosure statement that the Crockers were in good health and had no history of illness; doing so enabled him to issue

the insurance policy to them and collect the commission from the policy for himself.

There is no evidence that the Crockers had such knowledge and experience concerning credit life policies that would have put them at arm's length in their dealings with Taylor; on the contrary, the evidence shows that the Crockers relied on Taylor's expertise and superior knowledge and regarded him as their source of information concerning their loan transaction and the process of applying for credit life insurance. In view of this evidence, the jury could reasonably find that Taylor had a duty to disclose to the Crockers that the policy benefits might not be paid if Mr. Crocker in fact had had health problems and that his failure to do so induced them to obtain the credit life coverage, for which premiums were paid until coverage was denied at Mr. Crocker's death.

III.

Union Security next argues that the trial court committed several errors during the trial that require a reversal of the judgment against it.

Union Security first argues that the trial court erred in allowing into evidence the fact that it is a foreign-owned entity. Union Security claims that this evidence was injected into the trial as evidence of wealth, and it points out that a jury cannot consider the financial position of the defendant in assessing punitive damages. The questioning at issue occurred as follows:

> "Q. Mr. Hall, I believe you said that a Ms. Calik is your underwriter in your department and works under you.
>
> "A. Yes, she is.
>
> "Q. She is employed by American Securities Insurance, is she not?

"A. She worked for an American Securities Group at Union.

"Q. American Securities Group and Union Security Life, they are both owned by the same company, are they not?

"A. Yes, the Group is not an insurance company. The insurance company is under that Group.

"Q. The Group is owned by Ferris Enterprises out of Europe. Is that correct?

"Mr. Robertson [counsel for Union Security]: Your honor, I'm going to object to the relevance of that question.

"The Court: What is the question, Mr. Morris?

"Mr. Morris [counsel for Crocker]: The question was that American Securities and Union—I mean, the American Security group that Ms. Calik works for in [Mr. Hall's] Department, and the Union Security Life Insurance Group are owned by Ferris Enterprises, which is a European company that owns both of them, but both people work in there.

"The Court: What's the purpose of this line of questioning?

"Mr. Morris: We are going to call Ms. Calik. She says in her deposition she worked for a separate company. I think we need to show that they are one and the same, basically.

"Mr. Robertson: Judge, we don't see where that is at all relevant to what we're here on.

"The Court: You don't need to get too far down the line. Go ahead.

"Mr. Morris: I won't. Go ahead.

"Q. [By Mr. Morris]: Isn't that true?

"A. That's not the name of the company, sir. It's Fortis, F-O-R-T-I-S.

"Q. Fortis. I'm sorry. Fortis Enterprises. All right. Now, either American Securities and/or the American Securities and Union Security do business with a number of banks. You don't do business with just First Alabama Bank?

"A. That's correct."

In this testimony, there was no mention of wealth in the questions, nor can we find any intimation of the surplus or net income of the corporations. We note that counsel for Mrs. Crocker mentioned in closing argument that Union Security's parent company was European; however, these remarks did nothing to establish any evidence of the corporation's wealth, and Union Security did not object to them. The trial court has broad discretion in ruling on matters in argument of counsel, *United Companies Fin. Corp.* v. *Brown*, 584 So.2d 470 (Ala. 1991), and, after reviewing the record surrounding this exchange, we cannot hold that the trial court erred in allowing the foregoing questions.

Union Security next argues that the trial court erred in allowing Mrs. Crocker to submit evidence of the amount of premiums First Alabama receives, on a statewide basis, from marketing credit life policies with its loans.

Mrs. Crocker submitted evidence that, for the years 1988, 1989, 1990, and 1991, First Alabama generated almost $40 million in gross premiums through the sale of credit life insurance. Mrs. Crocker also established that the loss ratios of Union Security with First Alabama through these four

years were, respectively, 20.6%, 21.1%, 16.3% and 17.0%. She also presented expert testimony indicating that a 50% loss ratio was a more reasonable balance between the insurer and the insureds.

Mrs. Crocker points out that fraud loss ratios are admissible in evidence, *Independent Life & Accident Insurance Co.* v. *Harrington*, [Ms. 1921093, August 5, 1994] --- So.2d ---- (Ala. 1994), and argues that she could not compute the loss ratios for the jury without showing the gross earned premiums. Moreover, Union Security did not request a jury charge to limit consideration of the $40 million figure. After reviewing the record concerning the loss ratios, and the evidence as a whole, we find no error in the admission of evidence concerning First Alabama's gross earned premiums.

Union Security next argues that the trial court erred in refusing to charge the jury that punitive damages are not recoverable for innocent or mistaken fraud. Union Security requested the following charge: "The Plaintiff is not entitled to punitive damages if you find that Sammy Taylor committed a fraud upon the plaintiff that was committed mistakenly, innocently or negligently." The trial court rejected this proposed charge and ultimately instructed the jury:

> "Now, ladies and gentlemen of the jury, if you are reasonably satisfied that the defendants have been shown by clear and convincing evidence to be guilty of an intentional misrepresentation, deceit or concealment of a material fact, which the defendants had a duty to disclose, which was gross, oppressive or malicious, and committed with the intention on the part of the defendants of thereby depriving the plaintiff of property or legal rights or otherwise causing injury, and the plaintiff did suffer injury or damage as a proximate result of such fraud, then in your discretion you may award the plaintiff punitive damages in addition to any actual damages you find from the evidence the plaintiff did suffer."

With this, the trial court correctly set out the very clear, specific limits on the type of intentional fraud that must underlie an award of punitive damages; nothing in this instruction would lead a jury to believe that an innocent or mistaken fraud could support a punitive damages award, so there was no reason to think an additional instruction would be needed. The trial court's refusal of a requested written instruction, even though it is a correct statement of law, is not a cause for reversal on appeal if it appears that the same rule of law was substantially and fairly given to the jury in the court's oral charge. See Rule 51, Ala.R.Civ.P. We therefore find no merit in Union Security's argument on this point.

IV.

Union Security argues that the jury's verdict resulted from obvious bias, passion, and prejudice, and that it is due another hearing on the verdict. The trial court is peculiarly qualified to pass judgment on whether the verdict is the result of bias or prejudice. *Davidson* v. *Mobile Infirmary*, 518 So.2d 675 (Ala. 1986). Following the hearing on the question of excessiveness of the verdict, the trial court stated in its order that it considered "the presentation of the case by the respective attorneys; the demeanor, candor, and apparent truthfulness of the witnesses; the attentiveness by members of the jury and the 'feel' for fairness vel non in the atmosphere wherein the trial is conducted." Although the trial court went on to find that the verdict was excessive, it did so based solely on its determination that the award exceeded an amount necessary to accomplish society's goal of punishment and deterrence, based on the facts of this case. Our review of the record reveals nothing that contradicts the trial court's own observations made during the trial; thus, we find no error in its determination.

Union Security next argues that the trial court failed to properly review the jury verdict for excessiveness in accordance with the established standards set out in *Hammond*

v. *City of Gadsden*, 493 So.2d 1374 (Ala. 1986), and *Green Oil Co.* v. *Hornsby*, 539 So.2d 218 (Ala. 1989).

In ruling on a motion for remittitur in a punitive damages case, the trial court must make essentially two separate but related determinations: whether the amount of the jury's verdict was set by a properly functioning jury and, if so, whether the verdict was nevertheless excessive as a matter of law because it exceeds an amount that will accomplish society's goals of punishment and deterrence. *Hammond.* We have already upheld the trial court's determination that the verdict was not tainted or influenced by bias, passion, prejudice, corruption, or other improper motive or cause. The question now is whether the jury verdict was excessive as a matter of law.

In ruling on this issue, the trial court could consider several factors, including (1) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct, as well as the harm that actually has occurred; (2) the degree of responsibility of the defendant's conduct, the duration of the conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (3) the profitability of the defendant's conduct; (4) the financial position of the defendant; (5) the costs of litigation; (6) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (7) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation. *Green Oil.*

The trial court's order following the *Hammond* hearing shows that the court extensively reviewed its copious trial notes, as well as the evidence and relevant case law on comparative punitive damages awards. The trial court's order reflects a thorough analysis of the jury verdict and, after an exhaustive review of the record, we agree that the punitive damages award, after remittitur, does not exceed the amount necessary to promote society's goals of punishment and

deterrence, in order to exorcise fraud and inequity from the marketing of credit life policies. This Court recently observed the nature of this inequity in *Huff* v. *United Ins. Co. of America*, [Ms. 1931516, May 26, 1995] --- So.2d ----, ---- (Ala.1995), wherein we stated:

> "As the law in Alabama currently stands, an insurance company may issue a life insurance policy with its knowledge of its applicant's health coming solely from its agent's questioning of the applicant about his or her health history. The benefits from this type of transaction lie solely in favor of the insurance company and its agent. The insurance company receives premiums month after month, while the agent retains a commission from the sale. But when the insured dies, the insurance company refuses to pay the benefits provided by the policy. Its refusal is based upon its discovery, for the first time, that the insured's health was poor. When the policy is sold, an agent is not required to delve thoroughly into the applicant's background for the details of his health history. Such a requirement could prevent situations like the one in this case."

Union Security argues that it is entitled to a second *Hammond* hearing for a reassessment of the *Green Oil* factors in light of the fact that First Alabama had settled its liability. We note, however, that in its first *Hammond* order, the trial court specifically found that Union Security and First Alabama were jointly and severally liable for the judgment and that there was no evidence that "an award of $5,000,000 would place either defendant in receivership or bankruptcy." The judgment is now, of course, reduced to $2 million dollars and, in its second *Hammond* order, the trial court confirmed that it had already thoroughly reviewed the *Green Oil* factors and considered a second hearing unnecessary. After reviewing all of the record, we agree that the trial court's findings following the first *Hammond* order took into

consideration the *Green Oil* factors as they applied to Union Security jointly with First Alabama and as they applied to Union Security separately. We therefore find no error in the trial court's refusal to conduct a second hearing before issuing its second *Hammond* order after First Alabama had settled its liability to Mrs. Crocker.

Based on the foregoing, we affirm the trial court's judgment against Union Security.

AFFIRMED.

ALMON, SHORES, KENNEDY, and COOK, JJ., concur.

HORNSBY, C.J., and HOUSTON and INGRAM, JJ., recused.

On Application For Rehearing

OPINION MODIFIED (BY SUBSTITUTION OF PAGES 1-16); APPLICATION OVERRULED.

APPENDIX B

IN THE CIRCUIT COURT OF

CHOCTAW COUNTY, ALABAMA

EVELYN CROCKER,

PLAINTIFF,

vs.

CASE NO.
CV-92-064 K

UNION SECURITY LIFE
INSURANCE COMPANY, AND
FIRST ALABAMA BANK,

DEFENDANTS.

O R D E R

On February 17, 1994, a verdict was returned in this cause whereby the jury found for the plaintiff and against the defendants and assessed plaintiff's damages at $5 million. No request was made for the jury to be polled. The Court entered judgment on the same date for the plaintiff, Evelyn Crocker, and against the defendants, Union Security Life Insurance Company and First Alabama Bank, and assessed the plaintiff's damages at five million dollars ($5,000,000.00).

Subsequently, each defendant filed a motion for judgment notwithstanding the verdict or for new trial or remittitur. Initially, the Court set the said motions for hearing on June 1, 1994, which, by agreement of all parties, were continued until June 30, 1994. It was expressly agreed by all parties that said motions would remain pending in the trial court for ruling until July 22, 1994; and, by express consent of all parties, which said consent appears of record in this cause,

the said motions remain pending in the trial court for ruling until July 29, 1994.

The plaintiff's amended complaint was very precise and succinct. The trial of this cause was not especially lengthy, lasting only approximately four (4) days. The jury deliberated just thirty-six (36) minutes. However, February 17, 1994, will long remain as a day of demarcation for the assessment of damages by juries in lawsuits tried in Choctaw County, Alabama, for the verdict in this cause is far in excess of any previously awarded.

The reverberations resulting from the jury verdict in this cause will be long lasting throughout the local legal community and the county. When the verdict was read, gasps were heard, sobs sounded, hearts pounded loudly (some from glee, others from alarm), for from this day forward, it would forever be remembered that large punitive damage awards were alive and well, not only in Alabama, but, for the first time, in Choctaw County.

The Court has carefully reviewed the pleadings, the testimony, and the oral charge in this cause; has read each post-trial brief and affidavit filed in this matter; has considered the testimony, evidence and arguments presented in the post-trial hearing; and has reviewed the various and numerous authorities submitted to the Court post-trial. For purposes of any appellate review, ALL of the foregoing are to be considered as matters of record in this cause, and the same are hereby ordered to be made a part of any record on appeal.

The Court conducted a charge conference in this clause. The forms of verdicts were reviewed by the Court with counsel. There were no exceptions to the forms of verdicts by any party nor was there a timely request by any party for an itemized verdict. This is noted because there were claims for both compensatory and punitive damages by the plaintiff, and the Court in its oral charge to the jury instructed on

compensatory as well as punitive damages. Thus, this Court is somewhat in the same posture as was the Supreme Court of the United States in *Pacific Mutual Life Insurance Co. vs. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed. 2d 1 (1991), in attempting to ascertain the amount of punitive damages assessed by the jury. In *Haslip*, 111 S.Ct. at 1037, n.2, the Court stated, "...it is *probable* that the general verdict for respondent Haslip contained a punitive damages component of not less than $840,000. [Emphasis added.]" However, in the instant case it is more difficult for this Court to attribute the amount of the award to punitive damages, for the Court's oral charge to the jury on compensatory damages contained, inter alia, an element of damages for mental anguish. This is stated to illustrate that even though there certainly were punitive damages included in the jury's verdict in this cause, the exact amount thereof is not mathematically ascertainable. Nevertheless, in accordance with Section 6-11-23(b) CODE OF ALABAMA, 1975, as amended, the Court did conduct a post-trial hearing "concerning the amount of punitive damages."

JUDGMENT NOTWITHSTANDING THE VERDICT

As was stated in *Baptist Memorial Hospital vs. Bowen*, 591 So. 2d 74, 77 (Ala. 1991), "A motion for JNOV is properly granted only when: 1) there is either (a) a complete absence of proof on a material issue of fact or (b) no factual controversy upon which reasonable people could differ; and 2) the movant is entitled to a judgment as a matter of law. *Deaton, Inc. v. Burroughs*, 456 So. 2d 771, 773 (Ala. 1984). Furthermore, all reasonable inferences must be considered in a light most favorable to the nonmovant. Id." *See, also, Isbell vs. Smith*, 558 So.2d 877, 883 (Ala. 1989). Suffice it to conclude that there was significant conflict in the testimony presented in this cause and that the jury was convinced by clear and convincing evidence that there were facts supporting the plaintiff's claim. Too, the Court did not deny the motions for directed verdicts filed by the respective defendants without

carefully reviewing the testimony and reflecting upon the plaintiff's cause of action.

All of the above being considered and understood, it is, therefore, ORDERED, ADJUDGED, and DECREED that defendant First Alabama Bank's Motion for Judgment Notwithstanding the Verdict be, and the same hereby is, denied. It is, further, ORDERED, ADJUDGED, and DECREED that defendant Union Security Life Insurance Company's Motion for Judgment Notwithstanding the Verdict be, and the same hereby is, denied.

MOTION FOR NEW TRIAL OR REMITTITUR

The Court observed the demeanor and credibility of the witnesses who testified in this cause, as well as each member of the jury during the course of the trial. At all times the jury appeared attentive. The witnesses seemed to be truthful and testified without regard to bias or prejudice. Admittedly, the plaintiff was emotional during periods of the trial, but the subject matter of her concern, i.e, the prospect of losing her home when she thought it would be paid for by her deceased husband's credit life insurance, causes any display of her emotions to be understandable. Obviously, the jury, drawing on its common experiences in life, could comprehend the concern manifested by the plaintiff at the likelihood of losing her home due to the alleged fraud of the defendants.

As they perceived the evidence, it is obvious that the jury was shocked by the conduct of the defendants. In other words, from the jury's viewpoint the harm resulting to the plaintiff from the defendants' conduct was grievous. The cause of action in this case was not for negligence or breach of contract, but was for fraud. In reflecting upon some aspects of the evidence in this cause, it was undisputed that Sammy Taylor, duly authorized employee of defendant First Alabama Bank and licensed agent of defendant Union Security Life Insurance Company, never gave the plaintiff or her deceased husband, Coleman Crocker, either a certificate of

life insurance or a copy of the policy of credit life insurance which they had purchased. In fact, Mr. Taylor did not even know the terms of the credit life insurance policy which he sold the plaintiff and her deceased husband, nor had he ever even seen such a policy of credit life insurance. Taylor even testified he didn't know "when" or "if" people were covered who purchased this type credit life insurance from the defendants. Perhaps, Mr. Taylor's position is understandable in light of the fact that he did not know the terms and conditions of the credit life insurance policy issued by Union Security Life Insurance Company nor had anyone from the insurance company ever explained to him the provisions of such a policy or the procedures relative to same. This agent's limited knowledge may make his actions understandable, but such does not make the defendants' conduct excusable. One can read and re-read the Statement of Debtor's Physical Condition executed by Coleman Crocker at the time he purchased credit life insurance from the defendants, and nowhere is there any indication that there is any correlation between credit life insurance coverage and the answers as set forth on the Statement. Both of these defendants were in this business to make money, and the sale of credit life insurance was profitable to both.

As stated in *Industrial Chemical vs. Chandler*, 547 So.2d 812, 837 (Ala. 1988),

> Although not imposing the stigma of crime or the unique burdens of imprisonment, punitive damages nonetheless serve to place the defendant on notice that it has engaged in conduct considered intolerable by society and also serves to deter others from following the defendant's example. But in levying a punitive award, the degree or amount must be comparable to the act deserving punishment. And though the defendant has engaged in intolerable conduct, it does not surrender its right to "fair" punishment; in other words, "although punitive

> damages need bear no particular relationship to actual damages, they, nonetheless, must not exceed an amount that will accomplish society's goals of punishment and deterrence." *Green Oil Co. vs. Hornsby*, 539 So.2d 218 (Ala. 1989), citing *Maryland Casualty Co. vs. Tiffin*, 537 So.2d 469 (Ala. 1988), *City Bank of Alabama v. Eskridge*, 521 So.2d 931 (Ala. 1988), and *Roberson v. Ammons*, 477 So.2d 957 (Ala. 1985). Hence, we must ask, after the return of a jury award of punitive damages, what process is due the defendant to insure that he has been provided "fundamental fairness" at the hands of the law and to insure that society's goals of punishment and deterrence have been accomplished?

The Court will now review the issue of whether the punitive damages awarded herein were excessive. In doing so, the Court will follow the directives of the Supreme Court of Alabama as outlined in *Green Oil Co. vs. Hornsby* 539 So.2d 218 (Ala. 1989), and *Hammond vs. City of Gadsden*, 439 So.2d 1374 (Ala. 1986).

1. *Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually occurred.*

This case involved misrepresentations made by the agent for defendants as well as concealment by the agent of material facts from the plaintiff and her deceased husband in the purchase of credit life insurance. The plaintiff and her husband, Coleman Crocker, obtain a loan from defendant First Alabama Bank and purchased credit life insurance from loan officer Sammy Taylor. The policy of insurance was with defendant Union Security Life Insurance Company. The total amount of the loan, including the interest and cost of the credit life insurance, was, to-wit, twenty-one thousand eight hundred seventy-three dollars ($21,873.00). The cost to the plaintiff and her husband for the credit life insurance was one

thousand six hundred fifty-nine and 61/100 dollars ($1,659.61). The loan was obtained on, to-wit, October 15, 1990. Coleman Crocker died on August 28, 1991, and the insurance company refused to pay First Alabama Bank the outstanding balance of the loan in the amount of, to-wit, fourteen thousand five hundred sixty-three dollars ($14,563.00) because of a pre-existing heart disease, which did not appear on the Union Security Life Insurance Company form entitled Statement of Debtor's Physical Condition. The collateral for the loan was a double-wide mobile home in which the plaintiff and her deceased husband resided. The harm which resulted in this case is that the defendant Union Security Life Insurance Company failed to pay the claim of the plaintiff, *i.e.*, the balance of the loan to creditor-defendant First Alabama Bank, upon the death of plaintiff's husband, and thus not only was the loan, which was secured by a mortgage on her home, not paid, but all the expectations for which the plaintiff and her deceased husband had bargained and paid for, totally failed. The damages to plaintiff were grievous and, therefore, damages should be substantial.

2. *The degree of reprehensibility of the defendant's conduct should be considered.*

This appears to be an isolated incident insofar as both defendants are concerned in failing or refusing to pay a credit life insurance claim premised upon the fraud of their agent. There is no evidence either defendant engaged in similar misrepresentations or concealments/suppressions in their dealings with other credit life insureds. In other words, there is no evidence of repeated similar wrongs being committed by either of the defendants. This factor mitigates against the award of very significant punitive damages being assessed against the defendants.

3. *If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of the profit, so that the defendant recognizes a loss.*

It is without dispute that both defendants and their agent made a profit from the sale of credit life insurance. Mr. Taylor testified he received an incentive for selling credit life insurance for defendant Union Security Life Insurance Company while in the employ of defendant First Alabama Bank ($600-$800 annually). At the post-trial hearing there was evidence that the defendant Union Security Life Insurance Company realized a net gain from the sale of credit life insurance in the amount of $1,290,000.00 during the year 1991. Defendant First Alabama Bank, system wide, earned total commissions for both credit life and credit accident and health in the year 1991 in the amount of $1,228,000.00, while First Alabama Bank-Choctaw received commissions on credit life insurance in 1991 in the amount of $53,000.00. The Court notes that upon instructions from defendant Union Security Life Insurance Company, defendant First Alabama Bank refunded both the principal and the interest in terms of the proportion of the premium that was attributable to Mr. Crocker by crediting it to the Crockers' loan. However, this action was not taken until after the litigation was initiated.

4. *The financial position of the defendant would be relevant.*

At the post-trial hearing, testimony was elicited that at the end of 1993 defendant Union Security Life Insurance Company had a net worth of $24,340.000.00. Testimony further revealed that in the event the entire five million dollar ($5,000,000.00) judgment was to be paid by this defendant, payment would come from its unassigned surplus which totaled $14,990,000.00 at the end of 1993. This defendant contends that payment by it of the judgment would impair its competitiveness and adversely affect its ratings. Insofar as defendant First Alabama Bank is concerned, there was no

evidence presented relative to its financial position. However, the Court takes judicial notice that it is a large financial institution with branches throughout, at least, much of the state of Alabama. Certainly, there was no evidence that an award of $5,000,000 would place either defendant in receivership or bankruptcy. Because the judgment was awarded the plaintiff against both defendants, it is significant that each is jointly and severally liable.

5. *All the costs of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial.*

According to plaintiff's Post-Judgment Review of Punitive Damages brief, Mrs. Crocker's attorneys have already expended approximately $35,000. Compare this amount ($35,000) with the balance which was due on the plaintiff's loan, to-wit, $14,563, and one readily understands the significance of the following statement in *Principal Financial Group vs. Thomas*, 585 So.2d 816, 818 (Ala. 1991):

> A lack of a means of litigating because the contract amount involved is too small to obtain lawyers who can afford to file suit to recover only the contract amount would potentially deprive an insured, who thinks her case is just, of her day in court. This may free insurance adjusters from fairly investigating and reviewing small claims and may result in a loss of faith in the judicial system. Is this likely harm slight or grievous? Grievous.

Interestingly, the record reveals that plaintiff had previously engaged the services of another attorney to represent her in this dispute. Perhaps, that attorney did not have the necessary financial resources or time to pursue this claim. Accordingly, the Court finds that the verdict should be high enough to award not only a plaintiff such as Mrs. Crocker, but also her attorneys, significant recovery to litigate this type of case.

6. *If criminal sanctions have been imposed on the defendant for his conduct, this should be taken into account in mitigation of the punitive damages award.*

There has been no evidence produced that criminal sanctions have been imposed upon either defendant.

7. *If there have been any other civil actions against the same defendant, based on the same conduct, this should be taken into account in mitigation of the punitive damages award.*

There was no evidence presented of any other civil actions against either defendant with circumstances similar to those presented in this case.

As stated previously, this Court has found no repeated wrong-doing by either defendant. This was an isolated incident. Additionally, defendant First Alabama Bank has taken steps to remedy the conduct complained by the plaintiff. This defendant has developed a manual explaining credit life insurance and in 1993 distributed a copy of this manual to each bank and loan officer in the First Alabama Bank system. Training sessions have been held by this defendant wherein these manuals are explained to each loan officer. Among the instructions contained in the manual is one whereby there is a reminder that the insured debtor must be given a copy of the insurance certificate. First Alabama-Choctaw now requires the issuance of insurance certificates. Defendant Union Security Life Insurance Company has revised its UND-131 form Statement of Debtor's Physical Condition. The revised form UND-131A, contains the following language which was not printed on the original form: "Untruthful answers may result in denial of claims." These forms were shipped to defendant First Alabama Bank in December, 1990.

As was stated in *Nationwide Mutual Insurance Co. vs. Clay*, 525 So.2d 1339, 1344 (Ala. 1987),

> On state law grounds, Nationwide argues that punitive damages should bear some particular mathematical relationship to compensatory damages. However, we have repeatedly held that punitive damages need not *necessarily* bear any particular relationship to compensatory damages. *U-Haul Company of Alabama v. Long*, 382 So.2d 545 (Ala. 1980). We have said that decisions on punitive damages must be made on a case-by-case basis, and it is clear from our cases that this Court is willing to uphold substantial jury awards for damages, even in excess of $1,000,000, when the facts warrant such an award.

Thus, there is no particular relationship between the amount of compensatory damages and the punitive damages.

The relative brevity of this Order does not reflect the substantial amount of time this Court has devoted to this matter. The Court's copious notes of the trial of this case have been read and re-read; even portions of the transcribed testimony of some of the witnesses, and the oral charge have been reviewed. Every brief has been carefully considered, each having been read at least once. Numerous cases have been perused for, inter alia, comparative punitive damage awards, and the Court has conducted independent research. The Court has arrived at the conclusion that two of the most compelling considerations in developing this Order are: 1.) the right to a trial by jury is a fundamental, constitutionally guaranteed right (see Art. I, Section 11, Constitution of Alabama of 1901); and 2.) applying the criteria approved in *Haslip*, *supra*, a defendant's constitutional due process rights are not violated by a jury's award of punitive damages which are subject to *meaningful and adequate review* by the trial court. Implicit in the trial court's review of any punitive damage award are personal observations of the Court considering the presentation of the case by the respective attorneys; the demeanor, candor and apparent truthfulness of

the witnesses; the attentiveness by members of the jury; and the "feel" for fairness vel non in the atmosphere wherein the trial is conducted. All of these things have been considered from the unique position which was occupied by the trial court.

In the significant precedent case of *Green Oil Co. v. Hornsby*, *supra*, our Supreme Court stated as follows (at page 222):

> Because the purpose of punitive damages is not to compensate the plaintiff but to punish the wrongdoer and to deter the wrongdoer and others from committing similar wrongs in the future, the proper amount of punitive damages rests largely within the jury's discretion. However, although punitive damages need bear no particular relationship to actual damages, they, nonetheless, must not exceed an amount that will accomplish society's goals of punishment and deterrence. *Maryland Casualty Co. v. Tiffin*, 537 So.2d 469 (Ala. 1988); *City Bank of Alabama v. Eskridge*, *supra*; *Roberson v. Ammons*, 447 So.2d 957 (Ala. 1985).

and

> Bearing in mind that punitive damages must not exceed an amount that will accomplish society's goals of punishment and deterrence, it is possible for a jury to hear the evidence in the case, make findings of fact, correctly apply the law, and still, albeit unwittingly, assess damages that bear no reasonable relationship to the accomplishment of those goals.

Following *Green Oil Co. v. Hornsby*, *supra*, the Supreme Court in *General Motors Corp. v. Johnston*, 592 So.2d 1054, 1060 said:

> The presumption of correctness of a jury verdict can be overcome only by a *clear* showing that the amount of the award is excessive. *Green Oil Co.*, 539 So.2d 218 (emphasis added). "It is well understood that in considering the adequacy or excessiveness of a verdict, each case must be determined on its own facts, and that neither the trial court, nor this Court, may substitute its judgment for that of the jury." *Green Oil Co.*, 539 So.2d at 222, citing *City Bank of Alabama v. Eskridge*, 521 So.2d 931 (Ala. 1988); *Hammond*, 493 So.2d 1374.

The Court concluded its opinion by ordering a substantial remittitur.

Based on a thorough review of this case and on the amount of punitive damages awarded in other cases, this Court is of the opinion that the punitive damages award in this case is excessive and the Court orders a remittitur of $2,000,000. Even though a remittitur is necessary, this Court is of the opinion that the evidence supports a punitive damages award of $3,000,000. The determination of excessiveness is based upon applying the law that punitive damages should not exceed an amount necessary to accomplish society's goal of punishment and deterrence for the facts and circumstances of the case. The Court finds that an award of $3,000,000 will accomplish society's goals of punishment and deterrence in this case.

It is, therefore, ORDERED, ADJUDGED and DECREED by the Court that the Motions for New Trial filed by defendant United Security Life Insurance Company and by defendant First Alabama Bank be, and the same hereby are, denied, subject to the acceptance by the plaintiff of a remittitur of $2,000,000 within twenty-eight (28) days of the date of this Order. Acceptance of a remittitur of $2,000,000 by the plaintiff will result in a judgment in her favor against the defendants for the sum of $3,000,000.

DONE this the 29th day of July, 1994.

HARDIE B. KIMBROUGH,
PRESIDING JUDGE

FIRST JUDICIAL CIRCUIT
OF ALABAMA

DISTRIBUTION:

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Copy to:
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APPENDIX C

IN THE CIRCUIT COURT OF
CHOCTAW COUNTY, ALABAMA

EVELYN CROCKER,

PLAINTIFF,

vs. CIVIL ACTION
CV-92-064 K

UNION SECURITY LIFE
INSURANCE COMPANY and
FIRST ALABAMA BANK,

DEFENDANTS.

ON REMANDMENT FROM THE
SUPREME COURT OF ALABAMA

This trial court received the following Order from the Supreme Court of Alabama, dated the 26th day of October, 1994:

IN THE SUPREME COURT OF ALABAMA
October 26, 1994

1931672

Union Security Life
Insurance Company

v. Choctaw Circuit Court
CV-92-064K

Evelyn Crocker

ORDER

The appellant having filed a motion to reconsider this Court's order of October 3, 1994, denying the appellant's

motion for a remand of the above styled matter to the Circuit Court of Choctaw County for the purpose of holding a hearing in accord with *Hammond v. City of Gadsden*, 4339 So.2d 1374 (Ala. 1986) and *Green Oil v. Hornsby*, 539 So.2d 218 (Ala. 1989), and the same having been submitted and considered by the Court,

> IT IS CONSIDERED AND ORDERED that the motion to reconsider is granted and this matter is remanded to the Circuit Court of Choctaw County to review the judgment for excessiveness in accord with *Hammond* and *Green Oil*, *supra*, with return on this remand to be made within thirty days from the date of this order.
>
> Maddox, Almon, Shore, Houston, Steagall, Kennedy, and Cook, JJ., concur. Hornsby, C.J., and Ingram, JJ., recuse themselves.

This humble trial Court wishes to respectfully respond to said Order rather than taking any action relative to same because, stated simply, this Court can not procedurally discern why this Order was issued to *this Court*.

Initially, it is noted that there is no cause pending in the circuit court of Choctaw County, Alabama, styled *Union Security Life Insurance Company vs. Evelyn Crocker*. The Supreme Court's Order refers to case no. CV-92-064 K in the circuit court of Choctaw County, Alabama. The official court file in the office of the circuit clerk of Choctaw County, Alabama, in case no. CV-92-064 K is styled *Evelyn Crocker v. Union Security Life Insurance Company, and First Alabama Bank*.

Next, this trial Court has, in fact, already conducted a hearing and entered an order in accord with *Green Oil Co., vs. Hornsby*, 539 So.2d 218 (Ala. 1989), and *Hammond vs. City of Gadsden*, 439 So.2d 1374 (Ala. 1986); see fourteen (14) page ORDER attached hereto and made a part hereof. In attempting to follow the directives of *Green Oil* and

Hammond, *supra*, the trial Court, *inter alia*, addressed seven (7) criteria relative to each of the said defendants (see attached ORDER beginning at page 6 thereof). The trial Court ordered a remittitur of two million dollars ($2,000,000.00), which, if accepted by the plaintiff, would result in a judgment in favor of the plaintiff and against the defendants for the sum of three million dollars ($3,000,000.00).

Finally, the *last* filing, over which the *trial* court had *jurisdiction*, was an Acceptance Of The (trial) Court's Remittitur filed by the plaintiff and her attorneys of record. The said Acceptance resulted in a judgment in favor of the plaintiff and against each of the said defendants, jointly and severally, in the sum of three million dollars ($3,000,000.00). There is absolutely nothing else subsequently filed in the circuit court except an appeal by defendant Union Security Life Insurance Company to the Supreme Court of Alabama. It is this Court's understanding, based upon the record in the *trial* court, that there is presently pending in the circuit court of Choctaw County, Alabama, an unsatisfied judgment in favor of the plaintiff in the sum of three million dollars ($3,000,000.00), against each of said defendants, with defendant Union Security Life Insurance Company having filed an appeal relative to said judgment to the Supreme Court of Alabama. Absolutely nothing else is of record in the *trial* court.

This Court will note, being acutely familiar with every aspect of this cause at the trial court level, that these two (2) defendants never positioned themselves in an adversarial position to each other during the entire course of the trial proceedings. Their theories, defenses, and positions were not only similar, but the evidence presented by them as well as the arguments made, were intricately connected. To quote one of my favorite local trial lawyers, "They were as two hearts that beat as one" in defending this lawsuit.

Again, as stated at the outset, this Court seeks further guidance to comply with the Supreme Court's Order dated October 26, 1994, for this Court views the undeniable record in the *trial* court to be a judgment against *both* defendants for the *entire* sum of three million dollars ($3,000,000.00). Certainly, there has been no judicial action or ruling in the trial court in this case to cause any other interpretation by any court.

At no time prior to the entry of the attached ORDER by this Court did any party present any argument or cite any authority that the trial court should, or even could, apportion damages among joint tort-feasors at a *Green Oil* and *Hammond*, *supra*, hearing. A fortiori, no party presented any such argument or cited any authority to the *trial* court subsequent to the entry of said ORDER and while the trial Court still had jurisdiction of the subject matter. Of course, the court is well aware that damages are not apportioned among joint tort-feasors, and joint tort-feasors are jointly and severally liable for the entire amount of damages and the plaintiff need not elect to seek damages from one or the other. *See Buchanan v. Collier*, 555 So.2d 134 (Ala. 1989). In this cause two tort-feasors acted jointly to produce indivisible injury so there can be no apportionment of damages.

This Court feels compelled to reaffirm its attached ORDER, as it does not propose to retreat from or retract its prior holdings and statements, although such was opined recently by one of the illustrious justices.

Respectfully submitted this the 4th day of November, 1994.

HARDIE B. KIMBROUGH,
PRESIDING JUDGE

FIRST JUDICIAL COURT
OF ALABAMA

Supreme Court, U.S.
FILED
DEC 11 1995
CLERK

(2)

No. 95-740

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

UNION SECURITY LIFE INSURANCE COMPANY,
Petitioner,

v.

EVELYN CROCKER
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF ALABAMA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

UNION SECURITY LIFE INSURANCE COMPANY,

Petitioner,

v.

EVELYN CROCKER

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The petition challenges a $2 million damages award for intentional insurance fraud, which was reduced by the Alabama courts from the jury's original verdict of $5 million. The petition focuses its request for review almost entirely on the claim that it raises "a virtually identical issue" to that presented in *BMW of North America, Inc. v. Gore*, No. 94-896. That claim is inaccurate.

This case presents none of the questions of extraterritorial punishment, the role of remittiturs in curing constitutional error, and the possibility of multiple punishments for a single course of conduct, that are present in *BMW v. Gore*. The sole question presented here is an excessiveness claim. Indeed, although petitioner stated in its application for stay of the enforcement of the judgment below (which this Court granted by Order of October 10, 1995, 116 S. Ct. 295), that it would present *three* questions for this Court's review — including an extraterritoriality question and a procedural due process

question[1] — the sole question presented in the petition for certiorari concerns excessiveness.[2]

Petitioner's excessiveness claim is merely an argument that the Alabama courts misapplied settled principles of law. Such a claim is precisely the sort of factbound issue that does not warrant this Court's review. The Alabama courts have given full and fair consideration to any claim that petitioner wished to raise. Indeed, petitioner has had no fewer than *five* separate opportunities to challenge the judgment before the Alabama

---

[1] In the Application for Stay, petitioner stated that, "[s]pecifically, the issues to be presented are:

> 1. whether the $3 million punitive damage award in this case — $2 million of which the respondent, Evelyn Crocker is seeking from Union Security, which is 137 times Crocker's economic damages, and serves as punishment for *one isolated incident* by a Union Security agent — is so excessive as to violate the Due Process Clause and
>
> 2. whether the $3 million punitive damage award is unconstitutional given that the jury's award was based upon *alleged and unproven* fraudulent acts occurring outside the State of Alabama, which constitutes extraterritorial punishment that violates the Constitution.
>
> 3. A third issue, unique to the present case, is whether Union Security's due process rights were violated by the trial court's refusal to conduct a *Hammond* hearing, or consider evidence submitted by Union Security, after remand by the Alabama Supreme Court to conduct such a hearing."

Application for Stay at 2-3.

[2] The sole question presented by the petition is:

> Whether the $2 million punitive exaction in this case, which is at least 137 times the economic harm suffered by respondent, is so grossly excessive as to violate the Due Process Clause of the Fourteenth Amendment.

Pet. i.

courts: (1) an initial remittitur hearing before the Circuit Court for Choctaw County, Alabama, in which the court reduced the punitive award by 40%; (2) a subsequent proceeding before the trial court, after a co-defendant settled with the respondent; (3) a full appeal on the merits before the Alabama Supreme Court; (4) a rehearing petition; and (5) a denied application for stay.

This is a case where the processes of judicial review have *worked*. The original $5 million award has been reduced to $2 million. The Alabama courts have provided an ample explanation of why the remaining award is reasonable and have faithfully applied the principles of *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), *TXO Prod. Corp. v. Alliance Resources, Inc.*, 113 S. Ct. 2711 (1993), and *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994). There is no need for this Court's review, and nothing that this Court might hold in *BMW v. Gore* will have any bearing on this case.

Moreover, special features of this case make this Court's review particularly inappropriate. Although petitioner assumes that the entire $2 million award is punitive in nature, in fact the award contains a substantial compensatory component representing mental anguish suffered by respondent. At trial, petitioner declined to request an itemized verdict separating punitive and compensatory damages. As a result, petitioner's attempt to compute the precise relationship between the harm suffered by respondent and the punitive damage award is sheer conjecture.

In addition, the Alabama Supreme Court has recently announced a substantial modification of the State's system for awarding punitive damages. *Life Insurance Co. of Georgia v. Johnson*, No. 1940357 (Ala. Nov. 17, 1995). Henceforth, actions seeking punitive damages will be bifurcated into separate compensatory and punitive damages phases; jury instructions will be made even more detailed than those approved by this Court in *Haslip*; full post-trial judicial review

will be retained; and 50% of any final punitive judgment will be paid to the State rather than the plaintiff. These new procedures fully implement — indeed, they plainly exceed — the requirements of the federal Constitution. Petitioner asks this Court to review an Alabama punitive damages system that no longer exists.

The petition for writ of certiorari should be denied.

STATEMENT OF THE CASE

Petitioner's statement of the case is in effect an extensive jury argument that fails to present the facts in the light most favorable to the judgment below and indeed quarrels with the findings of the Alabama Supreme Court on several important issues of fact. Pet. 5-7 nn. 6-9, 14 n.11. There could be no better indication of the fact-specific, uncertworthy nature of this case than petitioner's need to re-argue facts found by the Alabama Supreme Court.

This case involves an intentional fraud by petitioner's agent, for which petitioner is liable under the Alabama law of respondeat superior approved by this Court in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). In addition to its vicarious liability, petitioner itself committed culpable acts that warranted punitive damages.[3] Petitioner had adopted a deliberate "see-no-evil" policy that facilitated the commission of fraudulent acts by its agents. Furthermore, it failed to provide its insureds with written copies of their policies, as

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[3] The jury was properly instructed that, under Alabama law, it could *not* impose punitive damages on petitioner unless (1) it "knew or should have known of the awareness of the agent . . . [and] continued to employ him or used his services without proper instruction with a disregard of the rights or safety of others"; or (2) it authorized or ratified his misconduct; or (3) "the acts of the agent were calculated to or did benefit the principal." R. 915-16.

required by Alabama law. Such a failure made it impossible for the insureds to protect themselves against the agent's fraud.

1. *Union Security's Business.* Petitioner Union Security sells credit life insurance in conjunction with loans made by First Alabama Bank in Choctaw County, Alabama. Under this arrangement, Union Security, in exchange for a premium, pays off any outstanding loan balance in the event of the borrower's death. Petitioner authorized Sammy Taylor, a First Alabama branch manager in Choctaw County, as its agent to offer the coverage to loan applicants. Pet. App. 5a; R. 302-03.[4] Contrary to petitioner's claim (Pet. 7 n.9), Taylor testified that he received from Union Security "a monetary payment or incentive connected with the sale of credit life insurance." R. 540. The Alabama Supreme Court found that Union Security paid Taylor a "commission." Pet. App. 3a, 5a.

For credit life policies in excess of $10,000, Union Security required a "Statement of Debtor's Physical Condition." Pet. App. 3a. This health statement authorized Union Security to obtain all information related to the health, medical history, diagnosis, treatment, employment, or financial condition of the applicant, for purposes of evaluating or underwriting the application for credit life coverage. *Id.* The statement contained nine boxes to be checked "yes" or "no" in response to specific questions concerning the applicant's medical history. As a matter of company policy, Union Security issued credit life coverage only if all nine boxes were checked "no." *Id.*

2. *The Crockers.* Coleman and Evelyn Crocker were residents of Choctaw County who had been married some 31 years. They were people of modest means who lived in a

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[4] References to the Appendix to the Petition for Certiorari are styled "Pet. App. __a." References to the Reporter's Transcript of the trial below are styled "R. __." References to the Record of the clerk of the trial court are styled "Ct. R. __."

mobile home. Coleman had a history of heart problems and Parkinson's disease. He had heart by-pass surgery in 1984 and an angioplasty procedure in 1988. R. 565. He died in August 1991.

Mr. Taylor had known the Crockers for over two decades and was very familiar with Mr. Crocker's health history. As the Alabama Supreme Court found, "during the years that Mr. Crocker suffered from heart disease and Parkinson's disease," Pet. App. 5a, the families had fished together, vacationed together, and dined in each other's homes. R. 492, 532-33.

In October 1990, Evelyn called Taylor about taking out a $24,000 loan with First Alabama Bank. According to Evelyn, Taylor told her (falsely) that "we would be required to have credit life," and she replied that the Crockers would accept credit loan coverage. R. 571-73. The Alabama Supreme Court found that the evidence showed that Taylor's fraud "induced [the Crockers] to obtain the credit life coverage." Pet. App. 6a.[5]

But the evidence showed that Taylor knew that Coleman was uninsurable. A First Alabama employee testified that she specifically recalled a conversation in which Taylor had asked Evelyn Crocker "how Coleman was, did the procedure, his heart procedure that they had time, did it work this time" (R. 637), referring to the angioplasty performed in 1988. She further recalled on other occasions that Taylor had asked Evelyn if Coleman was doing better. R. 638. Another witness

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[5] Petitioner states that it is "undisputed that the Crockers affirmatively wanted credit life for this loan *without regard to Taylor's alleged representation*." Pet. 5-6 n.6. The record, however, says nothing of the sort. Mrs. Crocker testified merely that, *after* Taylor told her that "we would be required to have credit life," she replied that it was "all right" with her. R. 572. She also testified that Taylor's misrepresentation that "in the event something happened to either of [the Crockers], then the credit life would pay off the loan," was "one of the reasons" that they bought it. R. 629.

testified that Taylor admitted to him that he knew that Coleman had had heart surgery, undergone an angioplasty, and suffered from Parkinson's disease. R. 649-51.

Taylor failed to request the Crockers to fill out the medical statement and failed even to ask them for medical information. Instead, he filled out the medical statement himself, R. 495, and falsified the information he put on the application. As the Alabama Supreme Court found, "doing so enabled him to issue the insurance policy to them and collect the commission from the policy for himself." Pet. App. 6a. Taylor then called the Crockers and told them that the papers relating to the loan — 10 to 12 documents in all — were ready for them to sign. R. 572. Taylor asked absolutely nothing of the Crockers with regard to prior health history. R. 576, 577. "He said [to Evelyn Crocker], 'you are covered with credit life in case something were to happen to you or your husband,' and he said in the event something did, if one of us was to die, then our balance at the bank would be paid off." R. 575. Ironically, Coleman experienced noticeable tremors from Parkinson's disease on the very day that the application forms were signed. Pet. App. 5a.[6]

As the Alabama Supreme Court found, "[t]he evidence shows that at the time he prepared the Crockers' health disclosure statements, Taylor had been acting as the agent for Union Security in the sale of credit life policies for many years and was quite knowledgeable about the qualifications an applicant must have in order to obtain credit life coverage." Pet. App.

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[6] When asked at trial about whether he had questioned the Crockers regarding the health statement, Taylor replied: "No sir, because if he had answered "YES" on any, I would have discontinued the credit life." R. 509. Taylor stated that, on the other hand, if all boxes were checked "NO," the bank and Union Security would have received — in his words — an "award." R. 556-57.

5a. In addition, "[t]here is no evidence that the Crockers had such knowledge and experience concerning credit life policies that would have put them at arm's length in their dealings with Taylor; on the contrary, the evidence shows that the Crockers relied on Taylor's expertise and superior knowledge and regarded him as their source of information concerning their loan transaction and the process of applying for credit life insurance. In view of this evidence, the jury could reasonably find that Taylor had a duty to disclose to the Crockers that the policy benefits might not be paid if Mr. Crocker in fact had had health problems and that his failure to do so induced them to obtain the credit life coverage, for which premiums were paid until coverage was denied at Mr. Crocker's death." *Id.* at 6a.

3. *Union Security's refusal to pay.* After Mr. Crocker's death, petitioner refused to pay benefits on the credit life insurance policy, explaining that "[h]ad full disclosure been made at the time the Health Statement was completed coverage would not have been written on this loan." Ct. R. 311. Consequently, Evelyn was unable to make payments to First Alabama on her home mortgage and was threatened with legal action by the bank. R. 582, 584. Union Security took no steps to ensure that a refund of the insurance premium was made. Although First Alabama bank eventually credited the Crockers' loan with a refund representing the premium attributable to Mr. Crocker, no refund was made until after suit was filed. R. 742.

REASONS FOR DENYING THE WRIT

I. PETITIONER ERRONEOUSLY ASSUMES THAT THE ENTIRE $2 MILLION AWARD IS PUNITIVE

Petitioner's excessiveness claim is premised on the faulty

assumption that the entire $2 million damage award is punitive in nature. In fact, however, a substantial portion appears to represent compensation for mental anguish.

At trial, petitioner did not request an itemized verdict. Pet. App. 15a. Accordingly, the jury's verdict encompasses respondent's claim for mental anguish, on which the jury was instructed it could award damages.[7] Thus, the trial court explained that "in the instant case it is . . . difficult for this Court to attribute the amount of the award to punitive damages, for the Court's oral charge to the jury on compensatory damages contained, inter alia, an element of damages for mental anguish." *Id.* at 16a. Indeed, the amount of punitive damages in this case is wholly speculative.

Petitioner claims that "there was no testimony whatever about mental anguish." Pet. 17. Yet the trial court found otherwise. It explained that "[t]he harm that resulted in this case is that the defendant Union Security Life Insurance Company failed to pay the claim of the plaintiff, i.e., the balance of the loan to creditor-defendant First Alabama bank, upon the death of plaintiff's husband, and thus not only was the loan, which was secured by a mortgage on her home, not paid, but all the expectations for which the plaintiff and her deceased husband had bargained and paid for, totally failed. The damages to plaintiff were grievous and, therefore, the damages should be substantial." Pet. App. 20a. Respondent faced "the prospect of losing her home when she thought it would be paid for by her deceased husband's credit life insurance." *Id.* at 17a.

Indeed, the record clearly supported a substantial

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[7] "[T]he law has no fixed monetary standard to compensate for mental anguish. This element of damage is left to your good sound judgment and discretion as to what amount would reasonably and fairly compensate the plaintiff for such mental anguish as your find from the evidence that the plaintiff did suffer." R. 915.

compensatory award for mental anguish. At the time of the fraud, Mrs. Crocker was a 50-year-old woman who lived in a mobile home with her sixteen-year-old daughter. R. 562, 563. A disabled 25-year-old son lived nearby. R. 563. Mrs. Crocker worked part-time for the U.S. Postal Service. R. 564. Three weeks after her husband's death, Mrs. Crocker received a letter from Union Security — a company she "had never heard of," since it had never provided her with a written insurance policy, R. 580 — stating that "benefits are not payable" and her claim was being "investigated." R. 580. Mr. Taylor told her that "it looked like to him if it was investigated it should have been done when we took the loan out rather than after my husband died." R. 581. Ten days later, she received another letter misspelling her name and stating that Union Security would not pay benefits under the policy. R. 582. Mrs. Crocker told Mr. Taylor that "I need my money." R. 583. He advised her to retain a lawyer. R. 584.

Two months later, during the Christmas holiday season, Mrs. Crocker received a letter from the bank stating that her home mortgage loan payments were past due in the amount of $1,458.00 and threatening to refer the matter to the bank's attorneys unless uniess she paid the past due amount within nine days. R. 517-18, 584. At trial, Mrs. Crocker indicated that she understood the threat as involving foreclosure on her mobile home. R. 584. Mr. Taylor confirmed that he planned to tell the bank's lawyers to "initiate foreclosure proceedings" on Mrs. Crocker's home. R. 518. Of course, Mrs. Crocker had been led to believe by petitioner's agent that the credit life insurance would cover the loan repayment. And the past due amount was $200 *less* (R. 517-18) than the credit life insurance premium which petitioner concedes was "[u]nfortunately" not refunded to Mrs. Crocker after coverage was denied. Pet. 8.[8]

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[8] Petitioner tries to shift the blame for the failure to refund the

The mental anguish suffered by a 50-year-old recent widow of modest means facing the imminent loss of her home is obvious.[9] As the trial court found, "[o]bviously, the jury, drawing on its common experiences in life, could comprehend the concern manifested by the plaintiff at the likelihood of losing her home due to the alleged fraud of the defendants." Pet. App. 17a. Indeed, under Alabama law substantial compensatory damages are warranted by less severe emotional trauma. *E.g.*, *Life Ins. Co. of Georgia*, No. 1940357, slip op. at 9 (upholding $250,000 mental anguish award to plaintiff who "learn[ed] that the insurance policy she had paid on for almost three years was worthless," and noting that she "could not sleep and her meal schedule was disrupted"); *Sperau v. Ford Motor Co.*, 1995 Ala. Lexis 263, *52-53 (Ala. June 9, 1995) (allowing mental anguish awards of $200,000 and $500,000 in fraud case and explaining that "the loss of a single weekly or monthly paycheck to a person of insubstantial means may cause as much mental anguish as a multi-million dollar loss would to

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premium. Pet. 8. The fact is that Union Security made no attempt to ensure that any refund was made. After it denied the claim, it closed Mrs. Crocker's file. R. 344. Its claims manager testified that "I don't see anything referring to a refund of premium in here." *Id.* He stated that he didn't know anything about whether a refund was made, when it was made, what amount should have been refunded, or whether interest was paid. R. 345.

The only reason any refund was paid was the personal intervention of the President of First Alabama, Choctaw. R. 739-40. Even then, he acted only after the instant lawsuit was filed. Pet. App. 21a; R. 742-43. And he refunded only *half* the premium - the portion attributable to Mr. Crocker. R. 744.

[9] Mrs. Crocker testified that the events precipitated by the fraud caused her to be "upset," R. 587, but petitioner successfully objected to this testimony as "call[ing] for a mental operation and self-serving declaration on the part of the witness." R. 587. It is thus inconsistent for petitioner now to demand additional direct evidence of mental anguish, when it resisted such evidence at trial.

one of substantial means"), petition for cert. filed (Nov. 15, 1995); *Duck Head Apparel Co. v. Hoots*, 659 So.2d 897 (Ala. 1995) (mental anguish awards of $2 million, $1 million, and $500,000 for humiliation after supplier falsely accused former salesmen of misconduct); *Alabama Power Co. v. Harmon*, 483 So.2d 386, 390 (Ala. 1986) ($75,000 damages in mental anguish for breach of contract); *Birmingham Electric Co. v. Thompson*, 37 So.2d 633, 634 (Ala. 1948) ("there [is no] yardstick for . . . mental suffering").

II. IN ANY EVENT, THE AWARD IN THIS CASE WOULD NOT BE EXCESSIVE, EVEN IF ALL $2 MILLION WERE PUNITIVE

Petitioner's excessiveness claim simply ignores the careful analysis performed by the Alabama courts. The trial court issued a detailed, 14-page opinion remitting the damage award by $2 million and explaining the basis for its decision under the factors approved in *Haslip*. Pet. App. B. The court explained that its "copious notes of the trial of this case have been read and re-read; even portions of the transcribed testimony of some of the witnesses, and the oral charge have been reviewed. Every brief has been carefully considered, each having been read at least once. Numerous cases have been perused for, inter alia, comparative punitive damage awards, and the Court has conducted independent research." Pet. App. 24a. Moreover, the court took full advantage of its unique, first-hand vantage point: "Implicit in the trial court's review of any punitive damage award are the personal observations of the Court considering the presentation of the case by the respective attorneys; the demeanor, candor, and apparent truthfulness of the witnesses; the attentiveness by members of the jury; and the 'feel' for fairness vel non in the atmosphere wherein the trial is conducted." *Id.* at 24a-25a.

The Alabama Supreme Court reviewed the same factors and agreed with the trial court's decision. Pet. App. 10a-13a. The court explained that, "after an exhaustive review of the record, we agree that the punitive damages award, after remittitur, does not exceed the amount necessary to promote society's goals of punishment and deterrence, in order to exorcise fraud and inequity from the marketing of credit life policies." Pet. App. 11a-12a. The damage award in this case is plainly reasonable by reference to a host of factors approved by this Court in *Haslip* and *TXO*.

1. *The harm that was likely to occur from petitioner's misconduct, as well as the harm that actually occurred.* The trial court properly found that the damages to plaintiff were "grievous." Pet. App. 20a. She faced the prospect of substantial indebtedness and the loss of her home as a result of Union Security's failure to pay the balance of the loan.

The Alabama courts have expressed a special concern with the sort of insurance fraud at issue here. *See Life Ins. Co. of Georgia*, No. 1940357, slip op. at 13 ("The class of plaintiffs Life of Georgia preyed upon were from a group of citizens that need the most protection: elderly, uneducated, and low income."). Punitive damages "'help level the playing field between powerless plaintiffs and powerful defendants.'" *Id.* at 15 (citation omitted). "'Using punitive damages to redress the imbalance in the relationship between consumer and corporation is squarely within their historical tradition.'" *Id.* at 16 (internal quotation omitted).

Petitioner claims (Pet. 18 n.15) that the reprehensibility of its misconduct is mitigated by the fact that, some months *after* the threat of foreclosure was made, one of Mrs. Crocker's lawyers began to loan her money to enable her to make her mortgage payments so that she would not lose her house. R. 631. Petitioner's argument is frivolous. The damage award must be evaluated by the *potential* harm posed by petitioner's

misconduct. *See TXO*, 113 S. Ct. at 2722 (plurality opinion). Petitioner should hardly receive a windfall because one of respondent's attorneys volunteered to help her make mortgage payments — any more than a convicted swindler should receive leniency because a good samaritan happens to reimburse the victim for the financial loss. In any event, the attorney's assistance did not eliminate Mrs. Crocker's mental anguish or other harm, because the loan occurred long *after* the fraud and threatened foreclosure, R. 631-32, and because she still faces the obligation to repay the money to her attorney.

Petitioner also contends that the ratio between the harm and the damage award is excessive. Indeed, the petition is littered with arithmetic calculations about the precise ratio between the damage award in this case and the amount of the Crockers' loan, the amount remaining on the premium, and the profit derived from Union Security from the fraud. Pet. 17-18. Yet this Court has already held that there is no "ratio rule" prescribing a particular relationship between punitive damages and the harm suffered by a plaintiff.[10] More fundamentally, petitioner's calculations are flawed at their core because they assume that the entire $2 million damage award is punitive. In fact, there is reason to believe that the award includes a substantial component of compensatory damages. *See* Part I,

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[10] *See, e.g., TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2722 (1993) (plurality opinion) (neither 526:1 ratio between punitive and compensatory damages, nor 10:1 ratio between punitive damages and potential harm, would be constitutionally excessive) (plurality opinion); *Haslip*, 499 U.S. at 23 (4:1 ratio between punitive and compensatory damages, and 200:1 ratio between punitive damages and plaintiff's out-of-pocket expenses); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 262, 279 (1989) (ratio of punitive to compensatory damages over 100:1); *St. Louis, I. Mt. & So. Ry. Co. v. Williams*, 251 U.S. 63, 66 (1919) (penalty 113 times plaintiff's actual loss permissible because it need not be "confined or proportioned to ... loss for damages").

supra. Petitioner's "ratio" argument, and its effort to describe the award in precise mathematical terms, falls flat.

2. *The nature of Union Security's misconduct*. Petitioner's statement wholly misrepresents the basis of the award in this case. The Alabama courts found that Union Security bears full responsibility for the fraud in this case. The trial court found that no one from Union Security adequately supervised Taylor, "nor had anyone from the insurance company ever explained to him the provisions of such a policy or the procedures relative to same." Pet. App. 18a; *see also* R. 308.

Moreover, the Alabama Supreme Court found that "Union Security does not issue a written policy to those applicants who are accepted for coverage." Pet. App. 3a. Indeed, the trial court noted that "it was undisputed" that the Crockers never received "either a certificate of life insurance or a copy of the policy of credit life insurance which they had purchased." *Id.* at 17a-18a. Thus, "[o]ne can read and re-read the Statement of Debtor's Physical Condition executed by Coleman Crocker at the time he purchased credit life insurance from the defendants, and nowhere is there any indication that there is any correlation between credit life insurance coverage and the answers as set forth in the Statement." *Id.* at 18a.

These practices violated Regulation No. 28 of the Insurance Commissioner of the State of Alabama, which provides that "[a]ll Credit Life Insurance sold shall be evidenced by a policy, certificate or statement of insurance, which shall be delivered to the insured borrower or purchaser. . . . . Said policy, certificate or statement of insurance shall set forth the amount and term of the coverage, a brief description of the coverage, including any exceptions, limitations, or restrictions." Ct. R. 253-54. Indeed, Union Security's claims manager testified at trial that he had "been made aware, possibly," of the company's violation of Alabama law. R. 433.

Petitioner ignores these important bases of the damage award,

and asserts (incorrectly) that the "*only* conduct of Union Security" that is at issue here is "its practice of investigating those claims made during the one-year contestability period that appear to be related to a condition listed on the Health Statement" — a practice that petitioner claims is entirely "lawful." Pet. 15-16 (emphasis in original). Even as to this aspect of its behavior, Union Security is wrong in suggesting that its conduct was not culpable. In fact, petitioner's policies facilitated the fraud. Prior to an application for credit life being approved, Union Security employs no safeguards whatsoever to ensure that its agents accurately fill out the health questions on its medical statement. R. 444. As the Alabama Supreme Court found, "Union Security does not examine the health records of those applicants who indicate on the health disclosure statement that they have no history of a particular illness or health condition. Union Security does, however, reserve the right to examine applicants' health records to determine 'after the fact' whether coverage should have been issued." Pet. App. 3a. The evidence showed that the great majority of claim denials result from post-claim investigation of the health statements. R. 334, 335.

Although the failure to investigate health conditions before issuing insurance is not criminal or directly prohibited by statute, it creates an atmosphere in which agents have every incentive to defraud consumers into signing up for credit life policies for which they would be disqualified for health reasons if they asserted a claim. After all, consumers who never make a claim on their credit life policies will never discover that they have been defrauded into making payments for worthless insurance that would not have provided them any protection. The Alabama Supreme Court explained:

> As the law in Alabama currently stands, an insurance company may issue a life insurance policy with its knowledge of its applicant's health coming solely from its

> agent's questioning of the applicant about his or her health history. *The benefits from this type of transaction lie solely in favor of the insurance company and its agent.* The insurance company receives premiums month after month, while the agent retains a commission from the sale. But when the insured dies, the insurance company refuses to pay the benefits provided by the policy. Its refusal is based upon its discovery, for the first time, that the insured's health was poor. When the policy is sold, an agent is not required to delve thoroughly into the applicant's background for the details of his health history. Such a requirement *could prevent situations like the one in this case.*

Pet. App. 12a (emphasis added and internal quotation omitted).

In its petition for certiorari, Union Security argues that it derives no benefit from its failure to ensure that the answers to the Health Questions are answered accurately. Pet. 14 n.11, 15 n.12. The hard evidence, however, is to the contrary. The record shows that, by employing lax screening procedures and maximizing sales of credit life insurance, Union Security earns immense profits. "[T]he loss ratios of Union Security with First Alabama through these four years [1988, 1989, 1990, and 1991] were, respectively, 20.6%, 21.1%, 16.3%, and 17.0%." Pet. App. 8a-9a. Expert testimony established that a 50% loss ratio was typical for other companies and represented "a more reasonable balance between the insurer and the insureds." *Id.* at 9a. Union Security's speculation notwithstanding, the facts showed that Union Security's "see-no-evil" policy redounds enormously to its own profit.[11]

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[11] At trial, Union Security's claims manager asserted that he was unaware that a 50% loss ratio is customary. He claimed to be unaware of anyone in the company who might be familiar with the topic. R. 372. Such evasiveness under oath further illustrated the need to punish Union Security.

Finally, it is significant that Union Security took virtually no corrective action in response to the fraud in this case. In fact, Union Security's claims manager testifed that Mrs. Crocker's claim was handled in "the normal way," R. 425; that he didn't see "anything wrong" with the way Union Security behaved, R. 425-26; and that no one was reprimanded, suspended, or received a citation as a result of the fraud. R. 427. Such lack of contrition is also an important basis of punitive damages. *See, e.g., Haslip*, 499 U.S. at 13-15 (punitive damages needed under respondeat superior to create incentive to discipline agents); *Life Ins. Co. of Georgia*, No. 1940357, slip op. at 12 ("The harm which was committed is even more egregious because [the defendant] refuses to admit or concede any wrongdoing whatsoever and merely [attributes] the sale of this policy [to] a 'miscommunication.'").

3. *The profitability of the wrongful conduct.* The trial court found that "[b]oth of these defendants were in this business to make money, and the sale of credit life insurance was profitable to both." Pet. App. 18a. The evidence showed that Union Security's net gain from credit life insurance was $1.29 million in 1991. *Id.* at 21a.

4. *The financial position of the defendant.* The trial court found that, at end of 1993, petitioner had a net worth of $24.34 million, and an unassigned surplus of $14.99 million. Pet. App. 21a. The punitive award plainly did not impair petitioner's financial position. Indeed, petitioner's wealth precludes any substantive due process attack on the award, for this Court has repeatedly noted the "well-settled law" that the size of a punitive damage award may be justified as constitutionally reasonable by reference to a defendant's wealth. *TXO*, 113 S. Ct. at 2722 n.28 (plurality opinion).[12]

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[12] *See also Haslip*, 499 U.S. at 21-22; *Browning-Ferris*, 492 U.S. at 300 (O'Connor, J., concurring in part and dissenting in part); *Newport v. Fact*

5. The costs of litigation. Under Alabama law, punitive damages perform an important function in encouraging private citizens to bring suit to vindicate the public interest. "Alabama citizens who become the victims of fraud have little recourse other than through litigation. . . . [T]he State Insurance Department has little power to regulate agents, and we judicially know that litigation is often the only weapon defrauded citizens have." *Life Ins. Co. of Georgia*, No. 1940357, slip op. at 14-15. "Attorneys who represent victims of fraud, such as the fraud practiced upon this plaintiff, bear all of the expense of the litigation and carry all of the risk of failure. . . . The lawyer takes a significant risk in such cases." *Id.* at 16. "Statistics indicate that most cases produce no money damages at all for plaintiffs or their lawyers. . . . Litigation is slow and carries no guarantee of success. . . . It is a heavy burden, and litigation is an inefficient way to stop fraudulent conduct — one lawsuit at a time, brought by one victim at a time — but it provides the only recourse a defrauded citizen of Alabama has." *Id.* at 17-18.[13]

This Court has similarly recognized the "private attorney

Concerts, Inc., 453 U.S. 247, 270 (1981); *Washington Gas Co. v. Lansden*, 172 U.S. 534, 551 (1899); Restatement (Second) of Torts § 908(2) & comment e (1977); *Punitive Damages: Relationship to Defendant's Wealth*, 87 A.L.R.4th 141, 151 (1992) (the "vast majority of courts" permit wealth to be considered).

[13] Even if the tort here was "an isolated incident" on the part of Union Security, Pet. App. 20a, 23a, Alabama was entitled to impose substantial punitive damages in order "to eradicate intentional conduct by the particular defendant before the court and to deter others from similar conduct." *Life Ins. Co. of Georgia*, No. 1940357, slip op. at 14. This Court has confirmed the function of punitive damages in providing "general deterrence" — *i.e.*, in preventing misconduct by other potential tortfeasors. *E.g.*, *Haslip*, 499 U.S. at 19-22; *Day v. Woodworth*, 62 U.S. (21 How.) 202, 213-14 (1858).

general" rationale for punitive awards. *E.g.*, *Missouri Pacific Railway Co. v. Humes*, 115 U.S. 512, 523 (1885) ("The injury received is often so small that in many cases no effort would be made by the sufferer to obtain redress, if the private interest were not supported by the imposition of punitive damages."). Thus, petitioner's attempt to minimize the economic loss suffered by respondent only goes to demonstrate the need for a substantial punitive award in this case.[14]

The trial court found that the award in this case was necessary to serve this private attorney general function and to provide respondent and her attorneys "significant recovery to litigate this type of case." Pet. App. 22a. The costs of litigation were substantial: as of the post-trial hearing, respondent's attorneys had "already expended approximately $35,000." *Id.* This sum, of course, does not take into account the additional expenses occasioned by the subsequent lengthy proceedings in this case. In addition, the trial court observed that respondent had previously engaged another attorney to represent her, who perhaps "did not have the necessary financial resources or time to pursue this claim." *Id.*

Hence, the award here is demonstrably reasonable under each of the familiar factors employed in reviewing punitive awards.

III. THIS CASE IS UNRELATED TO *BMW v. GORE*

In its Application for Stay, petitioner stated that it would present three questions for this Court's review, including an

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[14] *See also* Note, *Punitive Damages and the Reasonable Relation Rule: A Study in Frustration of Purpose* 9 Pac. L.J. 823, 841-42 (1978) ("Nowhere is the potential for a result contrary to the purpose of punitive damages greater than in the area of consumer actions. This is an area in which the claim of an individual is most likely to be so small in comparison to the cost of litigation as not to warrant court action.").

extraterritoriality question of the sort involved in *BMW v. Gore*. On the basis of that representation, this Court granted a stay of the judgment of the Alabama Supreme Court. 116 S. Ct. 295 (1995). Petitioner has now abandoned all but its excessiveness claim. *See* notes 1 and 2, *supra*. To be sure, petitioner had little choice in the matter, for it plainly failed to preserve the extraterritoriality issue below,[15] and the "extraterritoriality" issue is a red herring in this case.[16] But it is evident that this case is nothing like *BMW v. Gore*. This case involves what was indisputably "a properly functioning jury," Pet. App. 11a, not one that committed constitutional error (according to BMW, at least) by relying on out-of-state transactions.

Nor is the excessiveness issue in *BMW* related to the question presented by Union Security. The petitioner in *BMW* argues that its nondisclosure, even if wrongful, was "objectively" of only limited reprehensibility at best, because the conduct "comported with the statutory disclosure thresholds of numerous states" and was "consistent with industry practice." Brief of Petitioner in *BMW* at 39, 40; *see id.* at 36-42. In addition, BMW maintains that the award was "completely out

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[15] Petitioner made no objection on the basis of "extraterritoriality" to the introduction of any evidence at trial, to any portion of plaintiff's closing argument, or to any aspect of the jury instructions. Pet. App. 15a. Petitioner made no mention of the "extraterritoriality" issue in seeking a remittitur in the circuit court. Petitioner failed to raise the issue before the Alabama Supreme Court, even on rehearing.

[16] The jury was not asked to punish petitioner for extraterritorial acts. In fact, the trial court found that "no evidence" was before the jury of "similar misrepresentations or concealments/suppressions" by the defendants, Pet. App. 20a — and thus there were no extraterritorial acts on which the punitive award might have been based. Indeed, petitioner contends in another part of its argument that the award was based solely on "an isolated incident." Pet. 19.

of line with" the legislatively prescribed penalties for such misconduct set by Alabama itself, as well as by other States. *Id.* at 43; *see id.* at 42-44.

At oral argument in *BMW*, counsel for BMW stated that "in this case I think it's extremely important that the penalties provided under the Deceptive Trade Practices Act for fraud in selling automobiles is $2,000 if it's a civil penalty, or treble damages plus attorney's fees in a private action." Tr. Oral Arg. in No. 94-896, at 27-28. BMW also raised constitutional concerns about the imposition of multiple punitive damage awards on the basis of a single act by a defendant. *Id.* at 25, 27, 28.

This case is radically different, for it is wholly missing the objective indicators that BMW relies on to suggest excessiveness of the punitive award in its case. Nor is there any issue of "multiple" punitive damage awards here, for by petitioner's own admission this case involves a single "isolated incident." Pet. 19. And the simple fact is that petitioner has never pointed in this case to any state statutes, in Alabama or elsewhere, that create a safe harbor for the fraud at issue; and it has likewise never pointed to any industry practice that accepts or tolerates fraud of the sort at issue. Indeed, the Alabama Supreme Court has noted that insurance fraud is typically regulated by the state tort system, not by the State Insurance Department. *Life Ins. Co. of Georgia*, No. 1940357, slip op. at 14-15.

In short, the essential bases for BMW's claim of excessiveness, which are crucial to its effort to frame an objective standard and an outer limit for judging excessiveness, are lacking in this case. Thus, even if this Court agrees with BMW's argument, the ruling in that case would not affect the result here. This Court has not granted certiorari in every punitive damages case involving an excessiveness question. Indeed, even since the grant of certiorari in *BMW*, this Court

has frequently denied review in punitive damages cases, rather than holding the petitions pending disposition of *BMW*.[17]

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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[17] *See Gust v. Levy*, 116 S. Ct. 171 (1995) (cert. denied); *Smithtown, N.Y. v. Walz*, 115 S. Ct. 2557 (1995) (cert. denied); *Boyajian v. Olfacto-Labs*, 115 S. Ct. 2247 (1995) (cert. denied); *O'Quinn v. Kline*, 115 S. Ct. 2579 (1995) (cert. denied); *AJ & AJ Servicing Inc. v. Tudor Associates Ltd.*, 115 S. Ct. 1957 (1995) (cert. denied); *Ezzone v. Hansen*, 115 S. Ct. 1958 (1995) (cert. denied); *Ferrellgas Inc. v. Clay*, 115 S. Ct. 1102 (1995) (cert. denied).

No. 95-740

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In the Supreme Court of the United States

OCTOBER TERM, 1995

UNION SECURITY LIFE INSURANCE COMPANY, *Petitioner*

v.

EVELYN CROCKER, *Respondent*

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

The Chamber of Commerce of the United States of America (hereinafter "the Chamber") respectfully submits this brief as amicus curiae in support of the petition for a writ of certiorari.[1]

INTEREST OF THE AMICUS

The Chamber, a nonprofit corporation organized and existing under the laws of the District of Columbia, is the largest federation of business, trade, and professional organizations in the United States. It represents the interests of over 215,000 corporations, partnerships, and proprietorships, as well as several thousand state and local chambers of commerce and trade and professional associations. The Chamber regularly represents the interests of its members in critical matters before the courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government.

The Chamber has a significant interest in the issue of excessive punitive damages presented in this case. In recent decades, punitive damages have become increasingly common, reaching into the millions and even hundreds of millions of dollars in individual cases. Businesses such as those represented by the Chamber are the primary target of punitive damages claims and often suffer unpredictable and arbitrary awards. As a consequence, the Chamber and its members have a strong interest in ensuring that such awards are imposed in a manner that is fair, rational, and consistent with the Constitution's guarantee of due process.

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[1] The parties' letters of consent have been filed with the Clerk pursuant to Rule 37.2 of the Rules of this Court.

REASONS FOR GRANTING THE PETITION

This Court granted certiorari in *BMW of North America, Inc. v. Gore*, No. 94-896, to consider, among other issues, the question whether the $2 million punitive award in that case is unconstitutionally excessive. As the Court recognized in its most recent punitive damages case, although it is now well established that the Due Process Clause imposes a substantive limitation on the amount of punitive damages that may be exacted, to date the Court has not provided much guidance as to the "character of the standard that will identify unconstitutionally excessive awards." *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2335 (1994). The *BMW* case presents the Court with an opportunity to begin the process of defining the standard. But as the Chamber pointed out in its amicus brief in that case, the Court should not need to reach the excessiveness issue in *BMW* because the petitioner is entitled to a new trial as a consequence of the by-now conceded unconstitutional extraterritorial punishment that took place there.

If the Court agrees with the Chamber in *BMW* and therefore does not reach the excessiveness issue in that case, the Chamber submits that the Court should grant one of the several petitions presenting that issue that are being held in abeyance pending the Court's disposition of *BMW*. The issue of excessive punitive damages is not a quirky one; it recurs on a weekly (if not more frequent) basis. Juries continue to mulct corporate defendants at an alarming rate and in ever-increasing amounts. Reviewing courts continue to need guidance as to how to evaluate these massive exactions. The present case is a perfect example. The punitive damages in this case bear no reasonable relationship to either the plaintiff's harm, the defendant's gain, or the gravity of the defendant's misconduct. Indeed, in this case (as in many others coming out of Alabama) it is questionable indeed whether the defendant did anything wrong at all.

A. Punitive Damages Awards Have Continued Unabated Since The Court Granted The Petition For Certiorari in *BMW*.

The petition for certiorari in *BMW* contained an eye-opening list of multi-million dollar punitive exactions that had been imposed in the three months preceding the filing of the petition. That list was not aberrational. In the ten months since the Court granted the petition in *BMW*, the media have reported literally *dozens* of punitive verdicts that were equal to or greater than the one under review in *BMW*.

This parade of massive exactions includes punishments of **$400 million** against Loewen Group, **$300 million** against Durex Industries and its parent William Recht Co., **$175 million** against Turbomeca Engine Corporation and its French parent, **$60 million** against Suzuki, **$58 million** against Ford, **$57.8 million** against Affiliated FM Insurance Company, **$50 million** against Walmart, **$38 million** against Trustmark National Bank, **$25 million** against Prudential Insurance Company, **$25 million** against Dallas Nephrology Associates, **$25 million** against California Federal Bank and one of its subsidiaries, **$22.5 million** against Ford, **$21.42 million** against VF Corp, **$20 million** against General Motors, **$20 million** against State Compensation Insurance Fund; **$15 million** against Foremost Insurance Company, **$14.3 million** against Dupont, **$12 million** against Rheem Manufacturing Company, **$12 million** against Gilbert Commonwealth of Michigan and its corporate grandparent, **$10.1 million** against Unocal, **$10 million** against Dow Chemical Company, **$10 million** against Daewoo America, **$10 million** against Fireman's Fund Insurance Company, **$10 million** against Subway Sandwich Shops, **$9 million** against Household Credit Services, Inc., **$8 million** against Southwestern Bell, **$8 million** against Foremost Insurance Company, **$7.5 million** against North American Life and Casualty Company, **$7.15 million** against American Film Technologies, Inc, **$6 million** against Coca-Cola, **$5.6 million** against General Motors, **$5 million** against Olsten Corporation, **$4.5 million**

against the Phi Sigma Kappa fraternity, **$4 million** against Ryder Commercial Leasing, **$4 million** against East Penn Corporation, **$3.9 million** against United Services Automobile Association, and **$3.5 million** against Baxter Healthcare Corporation.[2]

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[2] *See Jury Awards $500 Million to Funeral Home Owner*, NAT'L L.J., Dec. 11, 1995, at A17; *$500 Million Awarded in Death of 9-Year-Old*, WASHINGTON POST, Sept. 30, 1995, at A2; Jackman, *$350M Jury Verdict in Crash*, NAT'L L.J., Aug. 7, 1995, at A6; Rankin, *Suzuki Decides to Fight, Loses*, NAT'L L.J., July 24, 1995, at A6; Kueterman, *Ford Loses Big in Bronco II Rollover Case*, NAT'L L.J., Nov. 13, 1995, at A11; *Samoan Gov't Wins $86.7M in Insurance Bad-Faith Suit*, NAT'L L.J., Oct. 23, 1995, at A17; *Wal-Mart Ex-Worker Awarded $50 Million in Sex-Harrassment Suit*, WALL ST. J., June 30, 1995, at B12; Epstein, *$38.5M Award Against Bank in Car Loan Case*, AM. BANKER, Jan. 30, 1995, at 1; *Jury Awards Retiree $25M in Fraud Case*, NAT'L L.J., Sept. 25, 1995, at A13; Boardman, *Big Suits: Bio-Medical Applications Management Co. Inc. et al. v. Dallas Nephrology Associates*, TEXAS LAW., Feb. 27, 1995, at 16; *Calif. Jury Finds Fraud in Handling of Bank Loans*, NAT'L L.J., July 31, 1995, at A9; Geyelin, *Jury Orders Ford to Pay $25 Million for Death Linked to Bronco II Rollover*, WALL ST. J., June 23, 1995, at B2; *Company to Get $22.14M in Suit over $350 Tax Bill*, NAT'L L.J., Aug. 7, 1995, at A13; *Macon Jury Tells GM to Pay Ex-Auto Dealer $26 Million*, BIRMINGHAM NEWS, June 9, 1995, at 1; *Insurer Must Pay $20.33M in Bad-Faith Action*, NAT'L L.J., Sept. 18, 1995, at A13; *Foremost Corp. Hit with $15M Jury Verdict in Ala. Suit*, DOW JONES INT'L NEWS SERV. 11:43:00, June 13, 1995; Miller, *DuPont Told to Pay About $23.9 Million in Benlate Case*, WALL ST. J., Jan. 27, 1995, at B5; *Maker of Water Heater Told to Pay $15 Million*, NAT'L L.J., Oct. 16, 1995, at A11; *$12M in Punitives Awarded in Retrial of Contract Case*, NAT'L L.J., Aug. 7, 1995, at A13; *Bad Faith Spelled Big Bucks*, SACRAMENTO BEE, May 14, 1995, at E1; Burton, *Dow Chemical Is Ordered to Pay Punitive Damages in Implant Trial*, WALL ST. J., Oct. 31, 1995, at B11; Granelli, *Daewoo Must Pay O.C. Piano Dealer $10 Million More*, L.A. TIMES, Oct. 21, 1995, at 1; Louis, *Dentist Gets $10 Million Settlement*, S.F. CHRON., Feb. 2, 1995, at D1; Gruber, *$10 Million Award a Lot to Swallow for Subway Shops*, CHI. TRIB., Nov. 29, 1995, at Bus. 3; *Debt Collection Outrages Carry $11 Million Penalty*, NAT'L L. J., Oct. 2, 1995, at A11; Bryant, *Movers Win $12 Million Jury Award*, ST. LOUIS POST-DISPATCH, May 5, 1995, at 1A; Couch, *Iowa Firm Wins Case Against Insurer*, DES MOINES REG., Nov. 17, 1995, at 10; *Insurers to Appeal $8.3 Million Award to Woman Denied Full Payment*, BNA HEALTH CARE DAILY, June 7, 1995; *Jury Says Film Company Defrauded*

Although trial courts ordered remittiturs in several of these cases, the amounts left standing generally remained enormous. For example, the $60 million punishment against Suzuki was reduced to **$20 million**, while the $50 million punishment against Wal-Mart and the $38 million punishment against Trustmark each were reduced to **$5 million** and the $22.5 million punishment against Ford was reduced to **$4 million**.[3] Moreover, trial courts have refused to disturb even a penny of the **$400 million** punishment against the Loewen Group, the **$21.4 million** punishment against VF Corp., the **$12 million** punishment against Gilbert Commonwealth, and the **$7.5 million** punishment against North American Life and Casualty.[4]

Former CEO, NAT'L L.J., July 10, 1995, at A11; Frank & Markels, *Coca-Cola Loses ADA Case for Firing Alcoholic in Treatment*, WALL ST. J., July 3, 1995, at B5; *Alaska Jury Finds Defect in Jimmy Belt*, AUTOMOTIVE NEWS, Nov. 13, 1995, at 52; *Ex-Olsten Executive is Awarded Damages in Discrimination Suit*, WALL ST. J., Nov. 10, 1995, at B8; Riley, *Paralyzed Woman Awarded $8 Million: Jury Decision Holds Fraternity Liable*, ST. LOUIS POST-DISPATCH, Nov. 3, 1995, at 1A; *Ryder Must Pay Millions*, K.C. STAR, Nov. 15, 1995, at B1; Sanford, *Battery Company Awarded $4,087,000*, BIRMINGHAM NEWS, July 10, 1995, at 7B; Burdman, *Jury Says Insurer Acted in Bad Faith*, S.F. CHRON., June 10, 1995, at A19; *$6 Million Award in Implant Case*, N.Y. TIMES, Feb. 5, 1995, at 18, col.4.

[3] *See Suzuki Appealing Accident Ruling*, ST. LOUIS POST-DISPATCH, Nov. 15, 1995, at 3B; Jackman, *Wal-Mart Verdict Cut to $5 Million*, K.C. STAR, Nov. 21, 1995, at B2; O'Hara, *Judge Slashes Damages Against Trustmark in Case Involving Force-Placed Insurance*, AM. BANKER, Aug. 9, 1995, at 8; *Judge Cuts Ford's Damages on 1992 Rollover Accident*, AUSTIN AMERICAN-STATESMAN, Aug. 26, 1995, at D5.

[4] *See Loewen Reviews Options for Obtaining Big Bond*, WALL ST. J., Nov. 21, 1995, at A4; *VF's Wings Clipped*, WOMEN'S WEAR DAILY, Sept. 21, 1995, at 11. The Chamber has not located news accounts of the trial courts' rulings regarding Gilbert Commonwealth and North American Life and Casualty. The Chamber's information regarding these cases is based upon representations of counsel for Union Security who represent both Gilbert Commonwealth and North American Life and Casualty in

As this survey reflects, the punitive damages crisis is very much real and enduring. The issue of excessive punitive damages thus remains an exceedingly important one that this Court should address either in *BMW* or in one of the cases that is pending at the time it decides *BMW*. As we next discuss, the present case is an ideal one in which to reach the issue if the Court does not do so in *BMW*.

B. Union Security's Petition Is An Ideal Vehicle For Addressing The Issue Of Excessive Punitive Damages.

In the event that the Court does not reach the excessiveness issue in *BMW*, Union Security's petition presents an ideal opportunity to do so. Unlike many of the petitions that the Court is holding for *BMW*,[5] Union Security's presents only an excessiveness issue. Accordingly, if the Court grants Union Security's petition, there is no possibility that some threshold issue would prevent it from reaching the excessiveness question.

Moreover, unlike some of the petitions that are now pending,[6] there is no real dispute in this case about the nature of the defendant's conduct. The parties and lower courts all are in agreement that Union Security was held liable for having its product sold by a banker who, on a single, isolated occasion, failed to disclose to a debtor that inaccuracies on a

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their state-court appeals.

[5] *See, e.g., Fraidin v. Weitzman*, No. 94-1230; *Liberty Mut. Ins. Co. v. Chemstar, Inc.*, No. 94-1337; *Owens-Corning Fiberglas Corp. v. Pickering*, No. 94-1476; *Honda Motor Co. v. Oberg*, No. 94-1890; *Independent Life & Accident Ins. Co. v. Harrington*, No. 94-2016.

[6] *See, e.g., Fraidin, supra*; *OXY USA Inc. v. Continental Trend Resources, Inc.*, No. 94-1838; *Wolfberg v. Greenberg*, No. 95-433.

health statement could result in the rescission of coverage.[7] The Court thus would be free of the kind of factual wrangling that has characterized some of its other punitive damages cases and instead would have a "clean shot" at the question whether the punishment is disproportionate to the gravity of the misconduct.

The Court is unlikely to find a better case than this one for reining in excessive punitive damages. As the petition demonstrates, the $2 million punishment here bears no reasonable relationship to the three central factors in the

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[7] *See, e.g.*, Opposition to a Stay of Execution of Judgment Pending the Filing of a Petition for Writ of Certiorari at 16, *Union Security Life Ins. Co. v. Crocker*, No. A-299 (filed Oct. 3, 1995) ("Petitioner is responsible, through respondeat superior, for the fraud of its agent Taylor."); Pet. App. 6a ("[T]he jury could reasonably find that *Taylor* had a duty to disclose to the Crockers that the policy benefits might not be paid if Mr. Crocker in fact had had health problems and that his failure to do so induced them to obtain the credit life coverage, for which premiums were paid until coverage was denied at Mr. Crocker's death.") (emphasis added); *id.* at 19a ("This case involved misrepresentations made *by the agent* for defendants as well as concealment *by the agent* of material facts from the plaintiff and her deceased husband in the purchase of credit life insurance.") (emphasis added); *id.* at 20a ("There is no evidence either defendant engaged in similar misrepresentations or concealments/suppressions in their dealings with other credit life insureds. In other words, there is no evidence of repeated similar wrongs being committed by either of the defendants."); *id.* at 23a ("[T]his Court has found no repeated wrong-doing by either defendant. This was an isolated incident.").

To be sure, the Alabama Supreme Court characterized as wrongful Union Security's practice of deferring the investigation of the accuracy of health statements until after a suspicious claim is made. Pet App. 12a. However, there is no factual dispute about that practice. The only questions are whether that practice should be considered in setting the punishment and, if so, whether it justifies a punishment of the magnitude involved here. The Chamber is of the view that Union Security's practice should not be considered at all because (1) it was not the basis for the jury's verdict (*See* Pet. 15) and (2) the practice was permitted by Alabama law at the time Union Security discovered the misstatement in Mr. Crocker's health statement (*see* Pet. 15-16 & n.13).

excessiveness calculus — the harm to the plaintiff (actual and potential), the gain to the defendant, and the gravity of the misconduct.[8]

Petitioner has persuasively demonstrated that the punishment is thoroughly disproportionate to any measure of harm to the plaintiff or gain to the defendant. *See* Pet. 17-20.

As for the gravity of the misconduct, the Court need do little more than read the opinion of the Alabama Supreme Court to ascertain that Union Security was the *victim* of an attempted fraud, not the perpetrator. It is obvious from the opinion and from the undisputed testimony cited by the petitioner that either the agent (Taylor) or the Crockers or both acting in concert intended to "slip one by" Union Security.[9] The agent was aware that if the health statement indicated a pre-existing condition, Union Security would

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[8] The Chamber submits that consideration of a corporate defendant's financial condition is legitimate only as a mitigating factor. A defendant's substantial net worth is not a basis for upholding a punitive judgment that bears no relationship to the harm to the plaintiff, the gain to the defendant, and the gravity of the misconduct, particularly when, as here, the jury was not exposed to evidence of the defendant's financial circumstances. It bears emphasizing, moreover, that there is a broad — and to our knowledge unchallenged — consensus among economists that in cases involving corporate defendants a punishment need not and should not be larger merely because the defendant has substantial assets or other indicia of wealth. *See, e.g., Zazu Designs v. L'Oréal, S.A.*, 979 F.2d 499, 508-509 (7th Cir. 1992) (Easterbrook, J.); 2 AMERICAN LAW INSTITUTE, REPORTER'S STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 253-255 (1991); Abraham & Jeffries, *Punitive Damages and the Rule of Law: The Role of Defendant's Wealth*, 18 J. LEGAL STUD. 415 (1989); Chapman & Trebilcock, *Punitive Damages: Divergence in Search of a Rationale*, 40 ALA. L. REV. 741, 824-826 (1989); Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 ALA. L. REV. 1143, 1176-1177 (1989).

[9] The most likely scenario involves the Crockers' knowing participation. After all, if Taylor were acting on his own, he could have had no assurance that the Crockers would not read the health statement, correct the material misstatements, and thereby foil his scheme.

decline to issue coverage, that the bank (of which he was a branch manager) would not have its loan payments secured, and that he would not receive credit toward a bonus. At the same time, the Crockers' prior experience made them fully aware that, if Mr. Crocker disclosed his health condition, they either would not receive coverage at all or would be forced to pay substantially higher premiums. The record in this case reflects that Union Security never authorized Taylor or any other agent to submit materially inaccurate health statements. Indeed, as the trial court repeatedly observed, this was an "isolated incident." Pet. App. 20a, 23a. Moreover, given the short contestability period applicable to credit life policies, Union Security plainly had no incentive to encourage agents either to falsify health statements themselves or to look the other way when an applicant does so. Once the one-year contestability period elapses, Union Security cannot revoke coverage no matter how blatant the misrepresentation on the health statement and no matter how substantial the risk of loss on the policy.

In short, this case involves no "bad facts" that might come to light only after the Court grants certiorari. Unlike *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993), the record in this case is devoid of evidence of some sort of corporate scheme to defraud or oppress. *Compare id.* at 2715-16, 2717 n.12, 2722 (plurality opinion); *id.* at 2726 (Kennedy, J., concurring). Moreover, since the stay proceedings, respondent has been represented by experienced Supreme Court counsel who specializes in punitive damages litigation.[10] It is therefore exceedingly unlikely

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[10] Counsel of record for respondent has represented the respondents in *BMW*, *Honda*, and *TXO*. In addition, he has testified before Congress against punitive damages reform and has written articles in praise of punitive damages.

Petitioner's counsel also are highly experienced in the area of punitive damages. Indeed, petitioner's counsel of record argued three of the Court's five most recent punitive damages cases -- *BMW*, *Honda*, and

that, if certiorari is granted, respondent will unearth at the merits stage some new legal theory not mentioned in the opposition that would dramatically alter the Court's perception of the case. *Compare TXO*, 113 S. Ct. at 2734 (O'Connor, J., dissenting) ("Respondents' $5.0 to $8.3 million estimate [of potential harm] appeared for the first time after this Court granted certiorari, having been produced exclusively for our consumption.").

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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DECEMBER 1995

Browning-Ferris Indus. of Vermont, Inc. v. *Kelco Disposal, Inc.*, 492 U.S. 257 (1989).

Supreme Court, U.S.
FILED
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No. 95-740

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

UNION SECURITY LIFE INSURANCE CO.,
Petitioner,

v.

EVELYN CROCKER,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

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BRIEF *AMICUS CURIAE* FOR THE AMERICAN COUNCIL OF LIFE INSURANCE IN SUPPORT OF THE PETITION

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QUESTION PRESENTED

Whether the $2 million punitive exaction in this case, which is at least 137 times the economic harm suffered by respondent, is so grossly excessive as to violate the Due Process Clause of the Fourteenth Amendment.

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BRIEF *AMICUS CURIAE* FOR THE AMERICAN COUNCIL OF LIFE INSURANCE IN SUPPORT OF THE PETITION

INTERESTS OF THE *AMICUS*[1]

The American Council of Life Insurance ("ACLI") is the largest life insurance trade association in the United States. ACLI represents the interests of more than 600 member life insurance companies; these companies currently underwrite 91 percent of the life insurance in force in legal reserve life insurance companies in the United States.

Defining the procedural and substantive limitations that the Due Process Clause of the Fourteenth Amendment imposes on punitive damages is an issue of vital importance to the *amicus*' members. In recent years, courts have permitted juries to assess substantial punitive damages awards against insurers and have deferred to those awards even though they are imposed without meaningful standards and bear no rational relationship to the purposes of punishment and deterrence. These decisions drastically and unpredictably enlarge the risks facing insurers, which must rely on a predictable allocation of risks and costs in providing insurance, and jeopardize their ability to offer affordable insurance.

One such decision, in which ACLI has also filed an *amicus* brief, is currently being reviewed by this Court in *BMW v. Gore*, No. 94-896 (*"Gore"*). Due to its genuine interest in the constitutionality of current punitive damages law, the *amicus* has also filed briefs in this Court in prior cases involving this issue. *See, e.g., Honda Motor Co. v. Oberg*, 114 S.Ct. 2331 (1994); *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989); *Bankers Life & Casualty Co. v. Crenshaw*,

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[1] Counsel for both the Petitioner and the Respondent have consented to the filing of this brief. Their consents are on file with the Clerk.

486 U.S. 71 (1988); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986).

This brief presents to the Court the view of the *amicus*, based on the experience of its broad-based constituents, concerning the importance of the Court's intervention in this case—a case that, perhaps better than any other case previously before this Court, squarely presents the constitutional problems with excessive punitive damages awards.

STATEMENT

1. Petitioner Union Security Life Insurance Company ("Union Security") sells, among other products, credit life insurance. This insurance pays off the balance of a loan where the insured debtor dies during the term of the loan. Pet. 2. During the period relevant to this case, First Alabama Bank ("First Alabama") and its branch at Choctaw ("First Alabama, Choctaw") were authorized to sell group credit life policies on behalf of Union Security. Pet. 2.

Union Security required that all individuals seeking credit life insurance for amounts over $10,000 fill out a "Statement of Debtor's Physical Condition" (hereinafter "Health Statement"). Pet. 2. The form, as it existed at the relevant time, asked whether the debtor had experienced a variety of health conditions over the preceding five years. Pet. 2. Among the listed conditions were "heart disease" and "nervous disorder." Pet. 2-3. It was and is Union Security's uniform policy to deny insurance to any applicants who acknowledge that they had experienced one of the listed conditions. Pet. 3.

If the insured debtor dies within the contestability period of one year that is permitted under Alabama law,[2]

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[2] The contestability period is the period of time during which the insurance company may dispute coverage on the basis that the policyholder made a material misstatement in his/her policy application. Alabama insurance regulations set this period at one year for credit life insurance policies. *See* Ala. Ins. Reg. No. 28, § VI(J)(2).

and dies from a condition apparently covered by the Health Statement, Union Security's uniform policy is to investigate whether the policyholder's Health Statement contained material inaccuracies. Pet. 3-4. If Union Security learns that the cause of death actually was an undisclosed pre-existing Health Statement condition, it denies the claim and returns the premium to the policyholder's representative. Pet. 4. Otherwise, it pays the claim without further inquiry. Pet. 4-5. Union Security only rarely denies a group credit life claim on the basis of such nondisclosure; these denials have occurred for under one percent of all of Union Security's group credit life claims. Pet. 4.

2. Respondent Evelyn Crocker, together with her husband, Coleman Crocker, purchased a group credit life insurance policy in conjunction with a loan from First Alabama, Choctaw in October 1990. Pet. 5. For years prior to buying the policy, Mr. Crocker had suffered from heart disease and Parkinson's Disease. Pet. 4-5.

Samuel Taylor, an employee of First Alabama, Choctaw, sold the Crockers the group life policy. Taylor filled out the Health Statement for each of the Crockers, indicating on the statement that neither had any of the listed medical conditions. Pet. 6. After having an opportunity to review his Health Statement, Mr. Crocker signed it, even though it inaccurately reflected that he had not suffered from heart disease or a nervous disorder. *Id.*

Mr. Crocker died of heart disease approximately nine months after the closing on his loan and the signing of his Health Statement. Pet. 8. Mrs. Crocker then made a claim for the loan balance. Because Mr. Crocker had died within the one-year contestability period and because the cause of death was a medical condition listed in the Health Statement, Union Security acted in accordance with its policy and investigated Mrs. Crocker's claim. *Id.* After learning from Mr. Crocker's doctor that Mr. Crocker was suffering from heart disease at the time he signed the Health Statement, Union Security denied Mrs. Crocker's claim and refunded Mr. Crocker's premium. *Id.*

3. Following Mr. Crocker's death, Mrs. Crocker stopped making payments on the loan and filed suit in Choctaw County court against Union Security, First Alabama, and First Alabama, Choctaw. Pet. 8. Mrs. Crocker's amended complaint alleged, *inter alia*, that Taylor, as an agent of both First Alabama and Union Security, had fraudulently "concealed" from the Crockers that he had disclosed inaccurate information on the Health Statement, that they had to be in good health to get the credit life policy, and that, if Mr. Crocker were to die of heart problems or a nervous disorder, coverage would be denied. Pet. 9. Only these fraud claims went to trial, as the trial court dismissed the breach of contract and bad faith claims against Union Security. Pet. App. 1a.

At trial, no evidence was presented that Union Security had authorized Taylor or any other agent to fill out Health Statements inaccurately or to conceal the fact that inaccuracies on a Health Statement could result in the denial of a claim. Pet. 6, note 7. Instead, Mrs. Crocker's attorneys laced their questioning and argument with evidence of Union Security's out-of-state location, foreign ownership, substantial aggregate premiums, and other irrelevant facts. Pet. 9-10. After deliberating for little more than a half-hour, the jury returned a general verdict holding the defendants jointly and severally liable for $5 million on the fraud theory. Pet. App. 1a-2a.

The trial court, after conducting a post-trial evidentiary hearing under *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986), sustained the jury's finding of fraud, but granted a *remittitur* of $2 million in punitive damages. The trial court concluded that the $3 million punitive damage award against Union Security was not excessive, even though the trial court acknowledged that Union Security's liability was entirely vicarious and, even then, was an "isolated incident" rather than part of a pattern of conduct. Pet. App. 20a, 23a. The trial court further concluded that $3 million was not excessive because Union Security had realized a net gain of $1.29 million from the sale of credit life insurance nationwide

and because Mrs. Crocker suffered "grievous" harm from the failure of the Crockers' bargained-for "expectations" under the policy. Pet. App. 20a.

Both defendants filed notices of appeal. First Alabama, Choctaw entered into a *pro tanto* settlement with Mrs. Crocker that released First Alabama for $1 million. After learning of the settlement, Union Security successfully moved for a remand to the trial court for purposes of determining whether the $2 million that remained of the judgment was excessive in relation to Union Security's conduct. Pet. 12. Refusing to conduct a new hearing, the trial court issued a short order effectively holding that $2 million was not excessive as to Union Security. Pet. App. 28a-31a.

The Alabama Supreme Court affirmed the trial court's decision in all respects. The Alabama Supreme Court agreed that a $2 million punishment for Union Security was not excessive as it was an "amount necessary . . . in order to exorcise fraud and inequity from the marketing of credit life insurance policies." Pet. App. 11a-12a. In this regard, the Alabama Supreme Court held Union Security's marketing practices inequitable and deserving of punitive damages on the sole basis of language in a freshly-minted, unreported 1995 opinion. *Huff v. United Ins. Co. of America*, 1995 WL 317676 (Ala., May 26, 1995), decided more than three-and-a-half years after the Crockers' policy was issued. Pet. 13-14.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS THE SAME IMPORTANT CONSTITUTIONAL QUESTIONS CONCERNING THE EXCESSIVENESS OF PUNITIVE DAMAGES THAT WERE PRESENTED IN *GORE* AND SHOULD, AT A MINIMUM, BE HELD FOR DISPOSITION IN LIGHT OF *GORE*.

In many respects, the issues in *Crocker* are mirror images of those in *Gore*, where this Court is reviewing whether a $2 million punitive damages award is so excessive as to violate due process under the Fourteenth

Amendment. Like *Gore*, this case raises the same broad and recurring question: what is the "constitutional calculus" for deciding whether an award of punitive damages is grossly excessive and without a reasonable relationship to punishment and deterrence? *See, e.g., Haslip*, 499 U.S. at 22 (1991) (to satisfy the requirements of the Due Process Clause, punitive damages standards must "provide for a rational relationship in determining whether a particular award is greater than reasonably necessary to punish and deter"). And, like *Gore*, this case presents a number of related issues that warrant this Court's resolution, either in *Gore* or here, including the recurrent problems of using punitive damages awards to punish for lawful extraterritorial conduct, punish for conduct contemporaneously lawful within Alabama, and punish on the basis of a corporate practice undertaken for legitimate business reasons.

The significance of these constitutional questions prompted the Court to grant certiorari in *Gore*. Because the determination of constitutional excessiveness here depends on the Court's holding in *Gore*, this case should, at a minimum, be held for disposition in light of the resolution of *Gore*. See R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* §§ 4.16, 5.9 (7th ed. 1993).

II. IN THE EVENT THAT THESE RECURRING AND IMPORTANT CONSTITUTIONAL ISSUES EVADE DEFINITIVE RESOLUTION IN *GORE*, THIS CASE PRESENTS AN EXCELLENT OPPORTUNITY FOR THE COURT TO ADDRESS THE EXCESSIVENESS ISSUE.

A. The Current Confusion Regarding Due Process Limitations On Punitive Damages Awards Will Continue Absent This Court's Definitive Resolution Of The Excessiveness Issue In *Gore* Or In This Case.

If the Court does not decide to address the full scope of the excessiveness issue in *Gore*, it should do so in *Crocker*. Both cases amply dramatize that punitive damages have indeed exceeded any legitimate bounds and

"run wild." *Haslip*, 499 U.S. at 18. *Gore* involves a judicially-sanctioned $2 million punishment for failing to disclose that a physician's BMW had undergone a paint job that affected its value, by at most, $4,000. This case, perhaps more egregious than *Gore*, involves a judicially-sanctioned $3 million punishment for an insurer's failure to pay a $14,563 claim under an insurance policy that was procured through the applicants' fraud.

To be sure, this Court has already declared that "general concerns of reasonableness . . . properly enter into the constitutional calculus" in determining whether an award is unconstitutionally excessive. *Haslip*, 499 U.S. at 18. Yet, the Court has not specifically identified what criteria or factors are indicators of unreasonable excessiveness.

Unless the Court elucidates the criteria for measuring punitive awards for unconstitutional excessiveness, lower courts will continue to address punitive damages awards without meaningful, objectively-measurable criteria for deciding whether a particularly large punitive damages award is unconstitutionally excessive, *i.e.* not reasonably related to punishment and deterrence. The current lottery-like system of large punitive awards will continue unrestrained —with no real assurance to defendants that their constitutional rights to due process will be protected—unless this Court intervenes with meaningful criteria for judicial review of the constitutionality of punitive awards. *See, e.g., Hanson v. American Nat'l Bank & Trust Co.*, 865 S.W.2d 302, 310 (Ky. 1993) (affirming $5.75 million award while stating that *Haslip* "did not identify the parameters [state courts] should apply in insuring that an award of punitive damages meets the test of due process").

B. The Alabama Courts' Justifications For Upholding The $2 Million Punitive Award Against Union Security Clearly Fail To Establish A Reasonable Relationship Between The Punitive Exaction And The Goals Of Punitive Damages.

This Court has repeatedly stated, in its due process jurisprudence, that punitive damages awards greater than

reasonably necessary to punish and deter are unconstitutional. *See Haslip*, 499 U.S. at 21-22 (allowing awards greater than necessary to punish and deter is unconstitutional). Punitive damages awards that are greater than reasonably necessary to punish and deter are those that bear no reasonable relationship to punishing or deterring the conduct at issue. *Id.* These awards fail to serve punishment or deterrence, the ultimate goals of all punitive awards, either by inflicting disproportionate punishment on an offender or by overdeterring or underdeterring future offenders.

The Alabama Supreme Court's and trial court's primary justifications for the size of Union Security's $2 million share of the punitive award were (i) the "inequity" of Union Security's post-claim investigation policy, (ii) its nationwide profits from the sale of credit life policies, and (iii) its supposed denial of bargained-for "expectations" never pled or proven at trial.[3] None of these justifications is rationally related to the goals of punishment and deterrence, and they demonstrate vividly that Union Security's $2 million share of the $3 million award is constitutionally excessive.[4] Indeed, the award is at least 68 times the actual and potential harm to the respondent, at least 2,400 times Union Security's profit, and at least 57 times the

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[3] Under Alabama law, the trial court was required to judge the reasonableness of the jury's award by seven factors under *Green Oil v. Hornsby*, 539 So. 2d 218 (Ala. 1989). Several *Green Oil* factors were not relied on heavily by the trial court or the Alabama Supreme Court to justify the $3 million size of the post-*remittitur* award. These were (i) the degree of reprehensibility of the defendant's conduct, (ii) the costs of litigation (the trial court only mentioned that the attorneys should recover a "significant" amount beyond their $35,000 fee, *see* Pet. App. 22a), (iii) the imposition of criminal sanctions, and (iv) the imposition of other punitive damages awards. Pet. App. 19a-24a.

The trial court rested on its original analysis when it declined to hold Union Security's $2 million share of the award excessive. Pet. App. 31a.

[4] Hereinafter, the brief refers to Union Security's $2 million share of the punitive award as the "award."

respondent's litigation costs. These amounts clearly exceed the four-to-one ratio that this Court, in *Haslip*, deemed "close to the line" of constitutional excessiveness. *Haslip*, 499 U.S. at 23.

1. *The Alabama Supreme Court's Award Of Punitive Damages Against Union Security On The Basis Of Its Lawful Conduct Serves Neither Punishment Nor Deterrence.*

The Alabama Supreme Court justified the amount of punitive damages against Union Security because it was "necessary . . . in order to exorcise fraud and inequity from the marketing of credit life policies." Pet. App. 11a-12a. Specifically, in affirming the trial court's judgment, the Alabama Supreme Court found punishable Union Security's limited use of post-claim, rather than pre-claim, health investigations—a practice that was entirely lawful under Alabama law at the time Union Security applied it to respondent's claim. *Id.* Indeed, as the Alabama Supreme Court's opinion makes clear, the supposed "inequity" of this conduct was first elucidated in Alabama in the 1995 *Huff* case.[5] *Id.*

Essentially, the Alabama Supreme Court punished Union Security for its 1991 conduct on the basis of a 1995 decision in another case against another defendant more than three-and-a-half years later. As the *Huff* court acknowledged, post-claim health investigations were entirely permissible and unobjectionable before *Huff* was handed down in May 1995:

> *As the law in Alabama currently stands*, an insurance company may issue a life insurance policy with

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[5] Other striking evidence exists that the Alabama Supreme Court went to any length to characterize Union Security's conduct as wrongful. The cause of action that would normally encompass intentionally wrongful investigatory conduct by Union Security, the bad faith claim, had already been dismissed by the trial court. Pet. App. 1a. Despite this, the Alabama Supreme Court declared Union Security's investigation policy inequitable.

> its knowledge of its applicant's health coming solely from its agent's questioning of the applicant about his or her health history.

Huff, 1995 WL 317676, at *2 (emphasis added). In fact, because the *Huff* court declined to make such conduct evidence of fraud, and Alabama regulations still explicitly permit credit life contestability within one year, these investigations remain lawful in Alabama. *See Huff*, 1995 WL 317676, at *3 (summary judgment for insurer affirmed); Ala. Ins. Reg. No. 28, § VI(J)(2).

Assessing punitive damages against a defendant for conduct that is lawful when that conduct occurs clearly serves neither the goal of punishment nor the goal of deterrence. This Court has recognized that punishment is fundamentally unfair when it is based on lawful conduct. *See, e.g., Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort. . . .") (citation omitted); *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964) (judicial construction that retroactively enlarges statute, making conduct illegal that was clearly outside prohibition of statute, violates due process). Simply put, no culpability deserving of punishment can exist where a party has no wrongful intent, reasonably believing that its conduct is lawful because the conduct is, at the time, lawful.

Punishing for lawful conduct likewise fails to serve the goal of deterrence. To be effective, deterrence requires that the potential wrongdoer be able to recognize what type of conduct is prohibited. D. Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1258, 1283 (1976). That party then is able to avoid engaging in the type of conduct that is prohibited, *i.e.*, it can successfully be deterred from the prohibited conduct. *Id.* But, where certain conduct is legal when undertaken, no one can possibly recognize the conduct as prohibited, avoid the conduct, and thus be deterred from it. Punish-

ing Union Security for abiding by its contemporaneously lawful post-claim investigation policy sends no meaningful message of deterrence to any potential defendant; it simply sends the message that Alabama courts may sustain large punitive damages awards by arbitrarily and retroactively labelling lawful conduct as "inequitable."

Such retroactive, aggregate punishment on the basis of ordinary business practices is a recurring problem, in Alabama and elsewhere, and should be addressed. *See, e.g., BMW v. Gore*, 646 So.2d 619 (Ala. 1994) (*per curiam*) ($2 million punitive award for uniform repair non-disclosure policy), *cert. granted*, 115 S. Ct. 932 (1995); *Intercontinental Life Ins. Co. v. Lindblom*, 571 So.2d 1092 (Ala. 1990) (close to $1 million punitive award for practice of allowing premium grace period), *vacated*, 499 U.S. 956 (1991), *op. reinstated*, 598 So.2d 886, *cert. denied*, 113 S. Ct. 200 (1992); *Hawkins v. Allstate Ins. Co.*, 733 P.2d 1073, 1077, 1083 & n.9 (Ariz.) ($3.5 million punitive award based on standard policy of subtracting a cleaning fee of $35 from the estimated value of total loss vehicles), *cert. denied*, 484 U.S. 874 (1987). This case presents a compelling opportunity for this Court to do so.

2. *The Alabama Supreme Court's And Trial Court's Award Of Punitive Damages Against Union Security On The Basis Of Its Nationwide Profit On All Sales Of Credit Life Insurance Serves Neither Punishment Nor Deterrence.*

a. *The Extraterritoriality Problem.* The courts below held that the punitive damages award in this case was appropriate, in part, because Union Security realized a $1.29 million nationwide profit from the sale of credit life insurance. Pet. App. 11a-12a, 21a. The trial court stated, and the Alabama Supreme Court affirmed, that it was appropriate, under the *Green Oil* factors, to remove this profit. *Id.* They did so even though respondent had adduced no evidence that either the sale of credit life in-

surance or post-claim investigations were illegal or considered wrongful in Alabama, much less the forty-nine states besides Alabama.[6] In fact, like Alabama, a vast majority of states consider legal both the sale of credit life insurance and the contestability of credit life claims, though some states, like Alabama, limit the time during which an insurer may contest a credit life claim. *See, e.g.*, Mo. Rev. Stat. § 385.070(d) (1994) (Missouri allows contestability of credit life for two years); Nev. Rev. Stat. Ann. § 690A.230(3) (1993) (Nevada allows contestability of credit life); N.C. Gen. Stat. § 58-57-25(c)(2) (1995) (North Carolina allows contestability of credit life for two years).

Awarding punitive damages based on conduct lawful outside the punishing jurisdiction obviously fails to serve the punishment goal. Alabama clearly has no rational interest in punishing defendants in other states who carry out their conduct in compliance with those states' laws. In punishing Union Security on the basis of its profits earned in forty-nine other states, Alabama seriously infringes upon these states' sovereignty. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 814-822 (1985) (due process violated where one state applies its law to a series of transactions, the vast majority of which have no connection with the state). It also defies fundamental principles of fairness under the Due Process Clause.

Nor can Alabama possibly have a rational interest in deterring the sale of credit life insurance or the contest-

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[6] In addition, the trial court confusingly considered the overall sale of credit life insurance to be the appropriate "wrongful conduct" for gauging the defendant's profit, Pet. App. 21a, while the Alabama Supreme Court later found the investigation and denial of credit life claims to be this "wrongful conduct." Pet. App. 11a-12a. However, whether the practice of selling credit life insurance or the practice of post-claim investigation was considered "wrongful conduct," punishing for such conduct outside of Alabama serves neither the goal of punishment nor the goal of deterrence.

ability of credit life claims within other states. If the states properly with authority to regulate a practice consider it lawful, they have necessarily determined that the practice should *not* be deterred, and another state can have no rational interest in deterring that lawful out-of-state conduct. Awarding punitive damages based on conduct that other states deem lawful plainly overserves any rational deterrent purpose and is excessive.

b. *The Aggregation Problem.* This case reveals a chilling thread that runs through the Alabama courts' punitive damages decisions. Alabama courts are willing to permit calculation of punitive damage awards simply by aggregating "profit" gained under a common, nationwide corporate practice or policy—without regard to the lawfulness or intent behind that practice or policy. *See, e.g., Gore*; *Lindblom, supra.* Allowing large punitive damages awards to stand because the corporate defendant happened to have a lawful, standardized procedure or practice has no rational connection with the goals of punishment and deterrence.

First, this case is even more extreme than *Gore* in demonstrating that basing punitive damages on "profit" from lawful, business-justified nationwide practices, as calculated by the Alabama courts under *Green Oil,* has no rational relationship to punishment. Here, not only was the $2 million punitive award approved largely on the basis that Union Security had a common corporate practice of selling credit life insurance, or of post-claim investigation, (*see* note 6, *supra*), *but the Alabama courts punished Union Security on this basis despite the trial court's finding that the alleged wrongful conduct (Taylor's purported misrepresentation) was "an isolated incident" not attributable to any overall policy or practice of Union Security.* Pet. App. 20a, 23a. Regardless of this factual finding, both the trial court and Alabama Supreme Court measured damages on the basis of "profit" from a corporate practice or practices that the trial court had acknowledged were

largely, if not wholly, irrelevant to the allegedly wrongful conduct at issue.

The mere fact that a defendant has a standardized practice, of course, does not make it more culpable and deserving of punishment. This is especially true where, as here, the standardized practices—Union Security's nationwide sale of credit life insurance and/or its uniform policy of post-claim investigation—were, at most, tangentially related to the issue in the trial court: the alleged unauthorized acts of a single agent. Standardized corporate policies may, as in this case, simply be required by economies of scale necessary for the company to make any profit at all. *See* Pet. 16 n.14, 18 (where Union Security's profit margin may be as low as 6%, it would be uneconomical to pre-investigate every Health Statement). There was no demonstration of culpable intent in Union Security's adopting such a policy.

Second, calculating punitive damages on an overall "profit" basis bears no rational relationship to deterrence. The Alabama courts, in upholding this award, ignore that the inevitable effect of awarding punitive damages far in excess of the defendant's entire nationwide profit from a business enterprise is to force any rational defendant to stop engaging in that enterprise. Because Union Security profits only $1.29 million from the sale of credit life, the $2 million punitive damages award arising out of a single credit life transaction—one of thousands of credit life transactions each month—wipes out its entire nationwide profit. Instead of deterring insurance companies from engaging in a certain type of conduct—such as giving non-employee agents discretion to sell policies or failing to provide conspicious written notice that false insurance applications could result in denial of claims—such punitive awards will overdeter by giving insurance companies the incentive to leave the credit life business completely. Even Alabama has recognized credit insurance as a worthwhile pursuit, *see, e.g.*, Ala. Ins. Reg. No. 28

(allowing credit life insurance under scheme of regulation), and destroying that business obviously serves no rational deterrence goal. *See, e.g., In re Northern Dist. of Calif. "Dalkon Shield" IUD Prod. Litig.*, 526 F. Supp. 887, 899 (N.D. Cal. 1981) (purpose of punitive damages is to sting, not kill, defendant), *vacated on other grounds*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

3. *The Alabama Supreme Court's And Trial Court's Award Of Punitive Damages Against Union Security On The Basis Of Respondent's Unspecified, Unsupported Failed "Expectations" Serves Neither Punishment Nor Deterrence.*

The trial court found, and the Alabama Supreme Court affirmed, that the $2 million punitive award was justified because the respondent's bargained-for "expectations" had "totally failed." Pet. App. 11a-12a, 20a. The trial court never explained why it considered relevant Mrs. Crocker's bargained-for "expectations" after it had dismissed the breach of contract claim against Union Security. Pet. App. 1a. Nor did the trial court explain how these expectations could be any greater in amount than the value of the insured loan, even as it awarded punitive damages greater than 137 times the loan balance. Pet. App. 20a. In sum, the failed "expectations" were a chimera in the trial court's *Green Oil* analysis, used to create a reasonable relationship between the respondent's harm and the size of the punitive award, when, in fact, there was none at all.

Assessing punitive damages on the basis of an entirely subjective, unproven phenomenon, like the supposed failed "expectations" in this case, clearly fails to serve the goals of punishment and deterrence. The basis of punishment cannot be insusceptible of calculation and a potentially unlimited bootstrap for liability, as it was in this instance, and rationally serve the goal of punishment. Of course, where punishment depends on standards that a

defendant cannot possibly know and that may be used to bootstrap any amount of punitive damages to a compensatory award, it overdeters. *See, e.g.*, D. Owen, *The Moral Foundations of Punitive Damages*, 40 Ala. L. Rev. 705, 729-730 (1989) (unpredictable punitive liability diminishes social utility by deterring useful social conduct); D. Ellis, *Punitive Damages, Due Process, and the Jury*, 40 Ala. L. Rev. 975, 988 (1989) ("[U]ncertainty as to potential liability induces overinvestment in liability avoidance, or worse, suppresses innovation, and results in higher insurance costs for all that are insured") (footnotes omitted).

C. Measurable, Objective Standards Exist For Determining Whether A Punitive Award Reasonably Relates To The Goals Of Punishment And Deterrence.

This case, like *Gore*, amply reveals the serious problems that exist for courts attempting to ensure due process in the exaction of large punitive damages awards. Unfortunately, because the *Haslip* opinion offered little guidance as to criteria for measuring unconstitutional excessiveness, cases like *Crocker* and *Gore* are not freakish but common.[7] This Court should intervene and articulate non-exclusive, but objective and measurable, criteria for lower courts to consider in determining whether particular punitive awards are so excessive as to violate the Due Process Clause. Such criteria should include (i) proportionality to the quantifiable harm that the individual plaintiff actually suffered or potentially may have suffered, (ii) comparison with legislative penalties for similar misconduct, (iii) the extent to which the defendant profited from the misconduct toward the particular plaintiff, and (iv) in

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[7] Although the Court approved Alabama's system of post-verdict review in *Haslip*, these cases amply demonstrate that Alabama's system of review is being misapplied in disregard of defendants' due process rights. Thus, an elucidation of criteria by this Court is necessary to keep such appellate review from becoming a hollow, meaningless process.

some cases, the reasonable litigation costs of the plaintiff. These criteria faithfully serve the goals of punishment and deterrence and thus may adequately guide a due process analysis of punitive awards.

Even a cursory examination of these criteria, applied to the facts in this case, reveals that the $2 million punitive damages award against Union Security is constitutionally excessive and warrants this Court's intervention:

1. *Actual and Potential Harm.* The best basis for determining unconstitutional excessiveness is comparing the punitive award to the sum of the quantifiable actual harm suffered by the plaintiff, and the quantifiable potential harm likely to occur to the plaintiff, from the defendant's conduct.[8] *See TXO Prod. Corp.*, 113 S. Ct. at 2721-22 (1993) (plurality opinion) (appropriate to consider actual and potential harm to plaintiff in reviewing punitive damages award). Even taking a liberal view of the damages the respondent suffered, or may have potentially suffered,[9] the $2 million award is clearly excessive.

At the outer limits, the respondent's actual harm could not have exceeded the amount of the balance of the loan ($14,563) that Union Security declined to pay. Even considering that the respondent had the "potential" harm of having her collateral—her residence—foreclosed upon by First Alabama, her total actual and potential harm would unlikely be more than double the loan amount or

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[8] Potential quantifiable harm is also a good measure of the reprehensibility of the defendant's act—a common law standard for punitive damages—that avoids the danger of arbitrariness in applying a vague concept like "reprehensibility."

[9] In taking this view, ACLI does not suggest the petitioner's well-reasoned arguments that the plaintiff suffered a much lower amount of actual damages, Pet. 17-18, are not ultimately correct. The *amicus* brief demonstrates that, even assuming *arguendo* an extremely liberal standard of actual and potential harm, the punitive damages remain unconstitutionally disproportionate.

$29,126.[10] This places the respondent's $2 million punitive damages award against Union Security at a level over *68 times* greater than her quantified actual and potential harm. As ACLI argued in its *amicus* brief in *Gore*, a punitive award that is disproportionate to actual and potential harm should be presumptively unconstitutional, unless the application of the remaining criteria rebuts that presumption—a presumption that the *amicus* contends applies here as well.

Even absent such a multi-criterion approach, this Court's precedent clearly supports the conclusion that the $2 million award here is excessive. Under the similar facts of *Pacific Mut. Ins. Co. v. Haslip*, which concerned an insurer's vicarious punitive liability for its non-employee agent's wrongful conduct in disregard of the insurer's policies, this Court ruled that a ratio of four-to-one between punitive and actual damages was "close to the line." *Haslip*, 499 U.S. at 23. ACLI submits that this case, with a ratio of over 68-to-one even after making favorable allowances for potential harm, has crossed that constitutional line.

2. *Comparative Penalties.* Courts should also compare the punitive award to the legislative and regulatory penalties for the conduct at issue. Here, the Alabama legislature and regulatory bodies have chosen to permit insurers to contest claims made within one year of the policy's signing. *See* Ala. Ins. Reg. No. 28, § VI(J)(2). Where the appropriate governmental bodies in Alabama have chosen not to punish conduct, implicitly setting the penalty for such conduct at zero, it cannot be more consti-

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[10] Had respondent been required to vacate her mobile home, her moving costs and rental costs for an equivalent residence during the trial would not likely have exceeded the amount of the loan balance. Moreover, given the alacrity with which her lawyers responded to service her debt, Pet. 18 n.15, foreclosure was a remote possibility at best.

tutionally disproportionate to levy a multi-million dollar punitive award on the basis of that conduct.[11]

3. *Profits from Misconduct.* In awarding punitive damages, courts should examine the extent to which a defendant profited from its conduct toward that individual plaintiff and remove any profit that was derived from the defendant's *wrongful* conduct pertaining to that individual plaintiff. As discussed above, *see supra*, at 11-15, when calculating this profit, courts should not indiscriminately aggregate all of the defendant's dealings under a general practice—particularly where the practice is not considered "wrongful" in most states. Among other things, this approach punishes a defendant solely for maintaining a standardized practice regardless of whether the practice was wrongful.[12] According to the evidence below, the profit attributable to Union Security for this transaction, a certain portion of the Crockers' premium, existed in an amount somewhere between $66.38 and $830.[13] Since the $2 million award is over *2,400 times*

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[11] While in previous briefs the *amicus* has suggested, as a constitutional criterion, the comparison of a punitive award to other punitive awards for similar conduct, *see, e.g.*, ACLI *amicus* brief at 21-23, *Gore*, the continued proliferation of punitive damages awards unfettered by constitutionally sufficient review increasingly makes this criterion unreliable in measuring punitive awards for unconstitutional excessiveness.

[12] Moreover, because the conduct that appears to be the true basis of the Alabama Supreme Court's opinion is the investigation and denial of the respondent's claim, it is even more improper to consider the net gain of all Union Security's nationwide *sales* of credit life as Union Security's "profit." If "profit" is to be assessed from this conduct, only profit from policies that were denied should be considered. On this basis, punitive damages here exceed 155 times the nationwide profit, and 3,000 times the Alabama profit, that resulted from selling the one percent of Union Security policies that involved denied claims. Pet. 19-20.

[13] These figures are the low-end estimate (4% of Mr. Crocker's premium) and the high-end estimate (50% of the joint premium) of the profit Union Security gained from the Crockers' purchase of credit life insurance. *See* Pet. 17-18.

this amount, the profit-based criterion supports a finding of constitutional excessiveness.

4. *Reasonable Litigation Costs.* Comparison of the punitive award to the reasonable litigation costs of the plaintiff likewise does nothing to justify the excessive amount of the award in this case. In some cases, it may well be appropriate to measure punitive damages in terms of reducing the cost of otherwise uneconomical litigation to encourage plaintiffs to bring merit-worthy claims, especially where the detection of the wrongful conduct is unlikely. But, even considering the $35,000 that the respondent's attorneys allegedly spent in litigation, the $2 million punitive damages award is over *57 times* that amount.

CONCLUSION

In sum, the punitive damages award against Union Security grossly exceeds any amount that could be reasonably deemed to serve the goals of punishment and deterrence. Taking into account all the relevant factors—that the award is greater than *68 times* the actual and potential harm to the respondent, that the petitioner's conduct was *explicitly permitted, not penalized*, by Alabama before this case, that the award is greater than *2,400 times* the petitioner's profit, and that the award is greater than *57 times* the respondent's legal costs—the award is unconstitutionally excessive.

The petition for a writ of certiorari should either be held pending the disposition of the *Gore* case or should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1995

UNION SECURITY LIFE INSURANCE COMPANY, *Petitioner*

v.

EVELYN CROCKER,

Respondent

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

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REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Respondent launches a barrage of non sequiturs in trying to persuade the Court that this case does not merit being held for *BMW*. For example, she emphasizes repeatedly (Opp. 1-2, 20-21) that the petition is limited to the important and recurring issue of excessive punitive damages, even though other issues were also at one time considered for presentation.[1] She also cites the irrelevant fact that the Alabama Supreme Court has adopted new procedures for administering punitive damages. Opp. 3-4.[2] She falsely accuses us of "fail[ing] to present the facts in the light most favorable to the judgment below." Opp. 4.[3] And she repeatedly attempts to tar Union Security with First Alabama, Choctaw's brush. See, *e.g.*,

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[1] As the Chamber of Commerce points out in its amicus brief (at 6), the fact that Union Security's petition is limited to the excessiveness issue makes this case an attractive candidate for certiorari in the event that the Court does not reach the excessiveness issue in *BMW*.

[2] As this Court has recognized, the Due Process Clause imposes a substantive limit on punitive damages that is distinct from the right to fair procedures. See, *e.g.*, *Honda Motor Co.* v. *Oberg*, 114 S. Ct. 2331, 2335 (1994); *TXO Prod. Corp.* v. *Alliance Resources Corp.*, 113 S. Ct. 2711, 2718 (1993). The petition presents a substantive excessiveness issue of nationwide importance — an importance not in the least diminished by revisions in Alabama's procedures.

In any event, the vaunted new procedures are not likely to ameliorate the problem of excessive punishments in Alabama, for they include allowing plaintiffs to introduce evidence of the defendant's financial condition and then instructing juries that "the amount of punitive damages should 'sting' the defendant, considering his financial condition." *Life Ins. Co. of Georgia* v. *Johnson*, 1995 WL 683857, at *10 (Ala. Nov. 17, 1995) (internal quotation marks and citation omitted). These changes alone amount to a prescription for ever larger punitive exactions, regardless of the effects of other procedural revisions.

[3] Our presentation of facts, which we sought to make meticulously accurate, is, unlike respondent's, borne out fully by citations to the record. Where facts were in dispute, we so informed the Court. See Pet. 5-6 nn. 6-7. Our position does not in any way depend on acceptance of the defense version of any disputed facts.

Opp. 4-5, 10, 15 (referring to *First Alabama, Choctaw's* failure to issue certificates of insurance); Opp. 8, 11 n.8 (referring to *First Alabama, Choctaw's* delay in making refund to Mrs. Crocker); Opp. 10 (referring to *First Alabama, Choctaw's* threats to foreclose).

What respondent cannot do, however, is point to anything in the record to refute the central reality in this case: Union Security was punished $2 million for an isolated act of misconduct by its "agent," a First Alabama, Choctaw branch manager whose fraud was calculated to benefit the bank and was directed principally against Union Security itself. Because Union Security was the target, not the perpetrator, of the fraud, this case is an especially clear instance of punitive damages run amok, and an unusually attractive one for addressing the substantive limits on punitive damages.

REPLY STATEMENT OF FACTS

Respondent's factual recitation is replete with inaccuracies. Many of these are irrelevant since, for purposes of this petition, we accept the jury's improbable conclusion that it was Taylor and not the Crockers who engaged in the fraud.[4] But

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[4] Nevertheless, we must correct some of the more egregious misstatements relating to Taylor. For example, respondent suggests (Opp. 6 n.5) that she agreed to purchase credit life insurance only after Taylor told her that she had to. In fact, she testified squarely that she wanted credit life insurance and that she had it on her other loans. R. 572-573. Even more misleading is the claim (Opp. 7 n.6) that Taylor admitted that he did not ask the Crockers the health questions. The quoted statement of Taylor was made in response to the suggestion that he could have misremembered whether the Crockers had answered "yes" to any of the health questions. See R. 508-509. Taylor testified repeatedly that he asked them those questions. R. 504-506, 522. Finally, respondent falsely states (Opp. 5) that "Taylor testified that he received from Union Security 'a monetary payment or incentive connected with the sale of credit life insurance.'" In fact, Taylor never said that he received a payment from Union Security. While he acknowledged that he received a monetary incentive in connection with the sale of credit life insurance through Union Security (R. 540), this monetary incentive was provided by First Alabama. C.

some of the misstatements do reflect on Union Security's own conduct. We correct them here so as to dispel any lingering doubts as to whether the record possibly could support a conclusion that Union Security was engaged in some kind of egregious misconduct. As the Chamber of Commerce points out in its amicus brief (at 9), "this case involves no 'bad facts'" equivalent to the ones that caused the Court to uphold the judgment in *TXO*.

1. Respondent states (Opp. 4) that Union Security "had adopted a deliberate 'see-no-evil' policy that facilitated the commission of fraudulent acts by its agents." As her failure to cite anything for this assertion suggests, there is not a whit of evidence that Union Security had a "deliberate 'see-no-evil' policy." Nor was there evidence that Taylor or any other agent *ever* had engaged in a fraudulent act other than the one charged here. Indeed, as the trial court expressly found, the alleged fraud on Taylor's part was "an isolated incident." Pet. App. 23a. See also *id.* at 20a.

2. Respondent repeatedly asserts (Opp. 4-5, 10, 15) that Union Security failed to provide its insureds with written copies of their policies. The record is unequivocal, however, that Union Security provided certificates of insurance to First Alabama Bank and that it was the president of First Alabama, Choctaw who made the unilateral decision not to send the certificates to covered debtors. R. 326-327, 448, 746-748.[5]

328-330. The "incentive" was hardly the kind that would induce someone to perpetrate a fraud: loan officers with sales of between $20,000 and $30,000 would receive a mere $600 (C. 330) — as little as $1 for every $50 dollars of premium. Thus, for the Crockers' $1,600 premium, Taylor could expect to receive a whopping $32.

[5] It is technically true, as the Alabama Supreme Court noted (Pet. App. 3a), that Union Security does not issue a written "policy" to covered debtors. Because the policy at issue is *group* credit life, the policy itself is issued to First Alabama. See Ala. Ins. Reg. No. 28, §II(C)(1). The certificate of insurance is all that need be sent to a covered debtor. *Id.* §

3. Respondent misleadingly states (Opp. 8) that "Union Security took no steps to ensure that a refund of the insurance premium was made." It is undisputed that Union Security instructed First Alabama, Choctaw to refund the premium. R. 346-347, 739. *First Alabama, Choctaw* may have been negligent in failing to carry out its responsibility, but that was hardly the fault of Union Security.[6]

ARGUMENT

Nothing respondent has said undermines the petition's showing that the punitive damages in this case are grossly disproportionate to the gravity of whatever tort Union Security could be said to have committed and bear no reasonable relationship to any measure of harm to Mrs. Crocker or gain to Union Security.

1. *The ratio of punitive damages to actual and potential harm.* We demonstrated in the petition (at 17-18) that the $2 million punishment in this case bears no defensible relationship to whatever harm could be said to have befallen Mrs. Crocker as a consequence of Taylor's alleged fraud. The response is two-fold. First, respondent claims (Opp. 8-12, 14-15) that it is improper to treat the $5 million general verdict (which now stands at $2 million after remittitur and the bank's pro tanto settlement) as entirely punitive because she sought damages for mental anguish. Second, she argues (Opp. 13-14) that, because she could have lost her home, her potential harm exceeds her actual harm. Neither of these arguments suffices

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VI(B). As indicated in text, the fault for the failure to send the Crockers a certificate of insurance is entirely First Alabama, Choctaw's.

[6] Respondent elsewhere (Opp. 10-11 n.8) accuses us of trying to "shift the blame" for the failure to pay the refund and states that it was "only" because of "the personal intervention" of the President of First Alabama, Choctaw that the refund was ever paid. Of course, since it was the *bank's* obligation to pay the refund under the contractual relationship between Union Security and the bank, Union Security is not shifting the blame, merely identifying where it belongs.

to remove this case from the class of ones that could be affected by the outcome in *BMW*.

With respect to mental anguish, it is true that Union Security did not object to the use of a general verdict,[7] but it is equally true that Mrs. Crocker failed to adduce *any* admissible evidence of mental anguish. Although she blames Union Security for successfully invoking Alabama evidentiary principles to prevent her from testifying about her state of mind (Opp. 11 n.9), it plainly was her burden to support with evidence the damages she was seeking. If she had suffered from loss of sleep or eating problems as a consequence of this experience, she could have so testified; such testimony does not involve simply "mental operations." Similarly, if her distress had required her to consult a doctor or therapist, or to take prescription medication, nothing would have prevented her from telling the jury. The truth of the matter is that the mental anguish claim was an insignificant aspect of her case until the time came to defend the punitive damages award.[8]

Because Mrs. Crocker neither attempted to quantify her anguish for the jury nor adduced any evidence that she suffered such anguish, there is no reason to assume that "a substantial portion" (Opp. 9) of the $2 million verdict represents compensation for mental anguish. But even accepting the suggestion that there were "substantial" mental anguish damages, that would hardly insulate the $2 million verdict from a claim of excessiveness. The size of that judgment vastly exceeds whatever tiny profit Union Security could be said to have made and has the same deterrent effect no matter how it is labeled. See, *e.g.*, *Memphis Community School Dist.* v. *Stachura*, 477

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[7] Respondent's representation (Opp. 3) that Union Security "declined" to request an itemized verdict has no support in the record.

[8] Mental anguish received only a passing reference during respondent's summations. See R. 832. By contrast, respondent's counsel went to great lengths to try to persuade the jury to return a multi-million verdict for purposes of punishment and deterrence. R. 833-834, 893-902.

U.S. 299, 307 (1986) ("Deterrence * * * operates through the mechanism of damages that are *compensatory*.") (emphasis in original). In such circumstances, a punishment of 20 times the "soft" damages suffered by Mrs. Crocker (assuming for purposes of argument a very liberal mental anguish award of $100,000) would still be utterly disproportionate and far exceed any amount reasonably necessary to accomplish rational deterrence. See, *e.g.*, *Crookston* v. *Fire Ins. Exch.*, 817 P.2d 789, 811-812 & n.29 (Utah 1991) (when compensatory damages are comprised largely of "soft" damages, the permissible ratio of punitive damages to compensatory damages should be smaller than if compensatory damages are essentially all "hard" damages).

Nor can respondent's "potential harm" argument save her $2 million verdict. As with mental anguish, Mrs. Crocker made no effort to demonstrate the extent of her potential harm. Yet since it is she who seeks to inject potential harm into the inquiry, it is she who bears the burden of establishing what that harm amounts to. Compare *TXO*, 113 S. Ct. at 2722 (record contained evidence from which it was possible to conclude that the potential harm to respondent was between $5 million and $8.3 million).

More fundamentally, there is a serious doctrinal question whether potential harm should have a role in cases like this one. Potential harm has been invoked principally in cases involving *deliberate* misconduct that fell short of its *intended* consequences. *TXO*, for example, involved a failed attempt to bully a small property owner into giving up potentially valuable mineral rights. In that case, it made good sense for the Court to take into account the losses that the respondent might have sustained had petitioner's oppressive scheme succeeded. See also *Livesy* v. *Stock*, 281 P. 70 (Cal. 1929); *Gilreath* v. *Allen*, 32 N.C. 67, 70 (1849); *Benson* v. *Frederick*, 97 Eng. Rep. 1130 (K.B. 1766). This case, in contrast, involves no deliberate misconduct on the part of Union Security. In cases of vicarious liability, it makes little sense to justify massive

verdicts by reference to speculative potential harm that the defendant had no intention of inflicting.

2. *Reprehensibility*. Respondent throws a variety of theories of wrongfulness at the wall, hoping that some will stick. But none do.

The principal basis for punishing Union Security is vicariously — for the fraud of the bank officer, who was registered as Union Security's agent in connection with the sales of credit life policies. In an effort to identify some wrong on Union Security's own part, respondent asserts that "no one from Union Security adequately supervised Taylor, 'nor had anyone from the insurance company ever explained to him the provisions of [the credit life] policy or the procedures relative to same.'" Opp. 15 (quoting Pet. App. 18a). Moreover she argues (Opp. 16) that "Union Security employs no safeguards whatsoever to ensure that its agents accurately fill out the health questions on its medical statement."

These assertions fail to advance her cause. To begin with, Taylor was an agent of Union Security's only in the most technical sense. He was first and foremost an officer of the bank, which, moreover, was the principal beneficiary of the insurance, which guaranteed that its loan would be repaid. To the extent Taylor committed a fraud, that fraud is far more the responsibility of his true principal, First Alabama, Choctaw than his victim, Union Security, which would have been on the hook for roughly $14,000 if Mr. Crocker had survived the one-year contestability period before dying. The practice of punishing the victims of wrongdoing is somewhat unusual in this country, at least outside of Alabama.

Moreover, the charge of inadequate supervision and lack of safeguards falls flat in light of the trial court's repeated finding that this alleged tort was an isolated incident. Pet. App. 20a, 23a. Respondent's inability to unearth, from among the tens of thousands of credit life transactions each year, a single other incident of fraud on the part of either Taylor or any other agent thoroughly undermines the suggestion that

there was inadequate supervision on the part of Union Security. As for the accusation that no one from Union Security explained to Taylor that he should not falsify health statements, it would probably not occur to many insurers (or anyone else for that matter) that something so fundamental needs to be the subject of training or that massive punishment is needed to deter insurers from falling victim to such misconduct.

Respondent also invokes the failure to provide the Crockers with a certificate of insurance (as if that would have made any difference to a person who admitted to putting away her loan documents without ever looking at them (see R. 632-633)). As explained above (at pages 3-4), the fault for this failure was entirely First Alabama, Choctaw's. Accordingly, while the failure to issue a certificate of insurance may have been an "important bas[i]s of the damages award" with regard to *First Alabama, Choctaw*, it supplies no support for the $2 million exaction against Union Security.

Respondent half-heartedly defends the Alabama Supreme Court's holding that there is something wrongful about deferring investigation until after a suspicious claim is filed. Opp. 16-17. Perhaps Union Security was guilty of naivete in failing to recognize that it was not entitled to assume that most applications it receives would be filled out truthfully, but this is hardly the stuff of multimillion dollar punishments. Nor does it "create[] an atmosphere in which agents have every incentive to defraud customers into signing up for credit life policies for which they would be disqualified for health reasons if they asserted a claim" (Opp. 16), since the policy can "mislead" only those who either make false statements on their applications or blindly sign applications containing false statements written in by their agent — hardly a group deserving of the enormous solicitude shown by the courts below. Finally, as we pointed out in the petition (at 14 n.11), the Alabama Supreme Court's rationale (and respondent's defense of it) cannot be squared with the fact that all credit life coverage sold in Alabama becomes incontestable one year (or less) after coverage commences: when there is a short contest-

ability period, the most likely victim of any fraud by an agent is the insurer, not the covered debtor.

3. *The gain to Union Security.* Respondent has no answer to our showing (Pet. 18-20) that the $2 million exaction in this case bears no relationship to whatever gain Union Security could be said to have received as a result of Taylor's one-time fraud. She merely repeats talismanically the entirely irrelevant fact that Union Security earned $1.29 million in 1991 from the sale of credit life insurance throughout the country. Her argument does nothing more than expose her belief that Union Security should be punished severely for being in the business of selling insurance.[9]

4. *Financial position.* Respondent makes the remarkable argument (Opp. 18) that Union Security's financial condition "precludes any substantive due process attack on the award." This is another way of saying that large companies (or even comparatively small ones like Union Security) have no right to protection from excessive punishments as long as they have the wherewithal to pay them. This kind of argument — which has

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[9] Respondent attempts to divert attention from this weakness in her argument by claiming (Opp. 17) that "Union Security earns immense profits" from the sale of credit life insurance. Of course, the loss ratios she cites are not a proxy for profits: they do not take into account the cost of selling and administering the insurance. More significantly, respondent has never shown a causal link between Union Security's loss ratios and its practice of deferring investigation until after a suspicious claim is made. Nor could she. The record is unequivocal that Union Security pays over 99% of the non-suicide claims made against it. See Pet. 4. If Union Security were to investigate the accuracy of every Health Statement before issuing coverage, that would increase its costs, which in turn would be passed on to its insureds. Ironically, this would make Union Security's loss ratios even lower because those ratios only measure the percent of premiums made out in claims and take no account of the cost of generating those premiums. Finally, we cannot help noting that respondent's focus on Union Security's "immense profits" boils down to the contention that there is something wrongful about being successful — a poor justification for the massive punishment in this case.

not a whit of support in this Court's precedents — serves only to highlight the pernicious effect of corporate wealth in punitive damages cases.

5. *The costs of litigation.* Respondent attempts to justify a $2 million exaction by reference to her costs of litigating this case. Of course, the $2 million exaction is grossly disproportionate to those costs. More importantly, this argument is circular: it was only the prospect of a multimillion dollar windfall that caused Mrs. Crocker and her counsel to invest large amounts in prosecuting what would otherwise have been a modest claim that could have been pursued more economically. Manifestly, the creation of additional incentives for expensive litigation, while nice for lawyers, is not a good reason to sustain large punitive damages.

CONCLUSION

This case is, if anything, a better vehicle for deciding the excessiveness issue than *BMW* itself. As in *BMW*, there is no reprehensible conduct here; indeed, as in *BMW* (and contrary to respondent's assertion (Opp. 22)), Union Security's conduct was expressly permitted by Alabama law (see Pet. 15-16 & n.13). Moreover, just as in *BMW*, the verdict here is entirely disproportionate to any tenable measure of harm to the respondent or gain to Union Security. Although, as respondent helpfully points out (Opp. 22) there is no issue of multiple punishment, that fact simply adds to the excessiveness of the punishment, since respondent cannot measure the magnitude of Union Security's "wrongdoing" by its impact on large numbers of victims. The Court accordingly should hold the petition until it has decided *BMW*. If it does not reach the excessiveness issue in that case, it should grant Union Security's petition and decide the issue in this case.

Respectfully submitted.

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DECEMBER 1995

No. 95-740

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

UNION SECURITY LIFE INSURANCE COMPANY, *Petitioner*

v.

EVELYN CROCKER,

Respondent

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

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SUPPLEMENTAL BRIEF FOR THE PETITIONER

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No. 94-1838 (May 28, 1996) 1

SUPPLEMENTAL BRIEF FOR THE PETITIONER

Pursuant to Rule 15.8 of the Rules of this Court, petitioner Union Security Life Insurance Company respectfully submits this supplemental brief to call attention to new authority not available at the time of petitioner's last filing. Petitioner respectfully submits that in light of the recent decision in *BMW of North America, Inc.* v. *Gore*, 64 U.S.L.W. 4335 (May 20, 1996), the Court in this case should — at a minimum — grant certiorari, vacate the judgment below, and remand the case for further consideration in light of *BMW*, just as the Court did with four cases yesterday.[1] In the alternative, because it is so clear that the award of punitive damages in this case is grossly excessive, the Court may wish to reverse the judgment below summarily and remand solely for the purpose of allowing the Alabama Supreme Court to select in the first instance the appropriate remedy for the unconstitutional punitive exaction in this case.

1. In *BMW*, this Court considered the constitutionality of an award of punitive damages in the same amount ($2 million) and upheld by the same court (the Supreme Court of Alabama) as the award at issue here. The Court cited a number of factors that led it to conclude that the award in *BMW* was so "grossly excessive" as to amount to a deprivation of property without due process. Each factor is present in this case. Indeed, this case involves an even more egregious excess than did *BMW*.

a. The first concern that led the Court to invalidate the award in *BMW* was that "[t]he award must be analyzed * * * with consideration given only to the interests of Alabama consumers, rather than those of the entire nation." 64 U.S.L.W.

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[1] *Apache Corp.* v. *Moore*, No. 95-1414 (May 28, 1996); *Combustion Engineering, Inc.* v. *Johansen*, No. 95-1072 (May 28, 1996); *Ford Motor Co.* v. *Sperau*, No. 95-771 (May 28, 1996); *Oxy USA Inc.* v. *Continental Trend*, No. 94-1838 (May 28, 1996). The now-vacated decision of the Alabama Supreme Court in one of these cases, *Sperau*, was cited in respondent's brief in opposition in support of the punitive award in the present case. Br. in Opp. 11-12.

at 4339. The Court so held because it lacked a sufficient indication that any State other than Alabama would regard BMW's conduct as unlawful. So too here, there is no reason to believe — and petitioner makes no effort to pretend — that any State other than Alabama would require an insurance company to pay not only benefits but also punitive damages to a person who obtained insurance by dissembling about the insured's health history. As we observed in the petition (at 19), the best information in the record about Union Security's sale of credit life insurance in Alabama in 1991 shows only $67,019 in earnings. Here, as in *BMW*, there is no relationship between the multimillion-dollar punitive award and the interests of *Alabama* consumers.

b. The Court's second expressed concern in *BMW* was that there must be *fair notice* of both the conduct that will be considered wrongful and the severity of the penalty that a State may impose. 64 U.S.L.W. at 4339 & n.22. This case badly flunks the fair-notice requirement. As we explained in the petition (at 15 n.13), the Alabama Code, insurance regulations, and court decisions all suggested that it is *proper* to deny coverage because of material and apparently fraudulent misstatements or omissions in an insurance application that, if corrected, would have led the insurer to decline coverage. That is indisputably the case here. Petitioner had no warning whatever that the Alabama Supreme Court would announce that it is wrongful to investigate claims made during the one-year contestability period that appear to be related to a condition listed on the Health Statement. To impose punitive damages in any amount for such conduct is constitutionally suspect, and to impose multimillion-dollar punitive damages is a flagrant denial of due process.

c. The Court in *BMW* relied heavily on the absence of "aggravating factors" showing a high "degree of reprehensibility" of BMW's conduct. 64 U.S.L.W. at 4340. So too here, it is hard to understand how anyone could think that Union Security did *anything* wrong, let alone engaged in such aggravat-

ed conduct as to support a multimillion-dollar exaction. As we have explained, petitioner was punished for an isolated act of misconduct by its "agent," a branch manager at First Alabama, Choctaw, whose fraud was calculated to benefit the bank and was directed principally at petitioner itself; petitioner was the target, not the perpetrator, of the fraud. Even if one suspends disbelief enough to think that petitioner actually did something wrong, it is just as true here as it was in *BMW* (see 64 U.S.L.W. at 4340) that the harm caused was solely economic and that there was no indifference to or reckless disregard for the health or safety of others. And petitioner, like BMW, was in no sense a recidivist (see *id.* at 4341); as we pointed out in the reply brief (at 7-8), respondent has been unable to unearth, from among the tens of thousands of credit life transactions each year, a single other incident of fraud on the part of either Taylor or any other agent. The trial court itself expressly found that the alleged fraud in this case was "an isolated incident." Pet. App. 23a; see also *id.* at 20a.

d. The Court in *BMW* debunked the notion — prominently featured in respondent's brief in opposition in this case (at 14-15) — that a high ratio of punitive damages to the actual harm inflicted on the plaintiff may be disregarded as constitutionally insignificant. It is true that there is no mathematical bright line separating acceptable from unacceptable ratios, but *BMW* exposes as false the *non sequitur* (Br. in Opp. 14) that the ratio can for that reason simply be ignored. Indeed, *BMW* describes the ratio as "perhaps" the "most commonly cited indicium of an unreasonable or excessive punitive damages award." 64 U.S.L.W. at 4341. The "breathtaking 500 to 1" ratio in *BMW* put that award outside the range. In this case, as we explained in the petition (at 17-20) and the reply brief (at 4-7), the ratio can be calculated in a number of different ways, but *all* of the calculations show that a $2 million award to a person who paid (part of) a $1659.61 premium for insurance that she was never entitled to receive in the first place is equally if not more "breathtaking."

e. Finally, the Court in *BMW* compared the punitive award to the civil and criminal penalties that could be awarded for "comparable misconduct." 64 U.S.L.W. at 4342. Such a comparison is difficult in this case, if for no other reason than that it is inconceivable that any legislator or regulator would regard petitioner's actions as "misconduct" at all. A rough measure of the gross excessiveness of the punitive award in this case may be gained, however, by comparing the $2 million award in this case to the same $2000 maximum civil penalty under the Alabama Deceptive Trade Practices Act that the Court cited in *BMW*. *Ibid.* That statute is designed to combat consumer fraud, just as the award in this case supposedly is, and it is highly significant that the jury and reviewing courts here punished petitioner a thousand times more severely than the Alabama Legislature thought appropriate for other consumer frauds. Again, the clear teaching of *BMW* is that the award in this case is grossly excessive and cannot stand.

2. Application of the *BMW* factors shows not only that this case is so similar as to justify further consideration in light of *BMW*, but indeed that the award here is so clearly beyond the pale that the Court would be justified in reversing the judgment below outright rather than simply remanding for further consideration. The Court in *BMW* was reluctant to intrude on the prerogative of the state court to select in the first instance the proper remedy for the grossly excessive punitive damages award in that case. It accordingly remanded the case for the Supreme Court of Alabama to make an initial selection between a new trial and an independent determination by that court of "the award necessary to vindicate the economic interests of Alabama consumers." 64 U.S.L.W. at 4343. A similar course would be appropriate here. The Court should either remand for further consideration in light of *BMW*, or summarily reverse the judgment below and remand with instructions similar to those in *BMW*.

Respectfully submitted.

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v.

EVELYN CROCKER
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF ALABAMA

RESPONSE TO SUPPLEMENTAL BRIEF OF PETITIONER

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

UNION SECURITY LIFE INSURANCE COMPANY,

Petitioner,

v.

EVELYN CROCKER

Respondent.

RESPONSE TO SUPPLEMENTAL BRIEF OF PETITIONER

Pursuant to Rule 15.8 of the Rules of this Court, respondent Evelyn Crocker respectfully submits this brief in response to the supplemental brief of petitioner addressing the implications of *BMW of North America, Inc. v. Gore*, No. 94-896 (May 20, 1996). It is plain that *BMW v. Gore* only *strengthens* the decision of the state supreme court in this case. Petitioner can invoke *BMW v. Gore* only by mischaracterizing the nature of its liability and the decision below. The petition for writ of certiorari should be denied.

1. The gravamen of petitioner's argument is that it has been punished for entirely legitimate conduct that it never had any basis to believe was wrongful. Pet. Supp. Br. 2. Petitioner's claim is utterly fanciful. Far from involving innocent, or even negligent, conduct, this case contains the aggravating factors of "'trickery and deceit'" and "intentional malice" that this Court indicated in *BMW v. Gore* are particularly "blameworthy" and call for substantial punitive damages. Slip op. at 15 (citation omitted).

Petitioner is liable for punitive damages under two theories. First, it is liable for the intentional fraud of its agent under the Alabama law of respondeat superior approved in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). Petitioner cannot dispute that its agent, Sammy Taylor, knew of Coleman Crocker's heart problems and Parkinson's disease; that he knew that Coleman was uninsurable; that he nonetheless induced the Crockers to purchase a credit life insurance policy; that he failed to ask the Crockers for their medical information; and that he simply filled out the forms himself, falsely checking "NO" answers to all the relevant health questions. The Alabama Supreme Court found that the evidence showed that "Taylor had a duty to disclose to the Crockers that the policy benefits might not be paid if Mr. Crocker in fact had had health problems and that his failure to do so induced them to obtain the credit life coverage, for which premiums were paid until coverage was denied at Mr. Crocker's death." Pet. App. 6a. The evidence also showed that Union Security wantonly trained its agent. Cert. Opp. 15. Petitioner's plea of innocence ignores these uncontrovertible facts.

In addition to its vicarious liability, petitioner is liable directly for punitive damages, for Union Security adopted unlawful policies that maximized its profits but facilitated the commission of fraud. The Alabama Supreme Court found that "Union Security does not issue a written policy to those applicants who are accepted for coverage." Pet. App. 3a. Indeed, the trial court noted that "it was undisputed" that the Crockers never received "either a certificate of life insurance or a copy of the policy of credit life insurance which they had purchased." *Id.* at 17a-18a. Thus, "[o]ne can read and re-read the Statement of Debtor's Physical Condition executed by Coleman Crocker at the time he purchased credit life insurance from the defendants, and nowhere is there any indication that there is any correlation between credit life insurance coverage and the answers as set forth in the

Statement." *Id.* at 18a.

These practices were illegal under Alabama law. Opp. Cert. 15. Indeed, Union Security's claims manager testified at trial that he had "been made aware, possibly," of the company's violation of Alabama law. R. 433.

Petitioner's illegal policies facilitated the commission of fraudulent acts by its agents. The failure to provide insureds with written copies of their policies made it difficult, if not impossible, for the insureds to protect themselves against the predations of petitioner's agents. Moreover, Union Security employs no safeguards whatsoever to ensure that its agents accurately fill out the health questions on its medical statement. R. 444.

The record shows that, by employing lax screening procedures and maximizing sales of credit life insurance, Union Security earns immense profits. "[T]he loss ratios of Union Security with First Alabama through these four years [1988, 1989, 1990, and 1991] were, respectively, 20.6%, 21.1%, 16.3%, and 17.0%." Pet. App. 8a-9a. Expert testimony established that a 50% loss ratio was typical for other companies and represented "a more reasonable balance between the insurer and the insureds." *Id.* at 9a. (Petitioner's far-fetched claim that it was the "target, not the perpetrator, of the fraud" (Pet. Supp. Br. 3) thus cannot be squared with the decisions of the Alabama Supreme Court and the trial court.)

Petitioner's only excuse is that it is "proper" to deny coverage because of misstatements or omissions in an insurance application that, if corrected, would have led the insurer to deny coverage in the first instance. Pet. Supp. Br. 2. The short answer to this excuse is that petitioner was not punished on such a basis. Petitioner was punished for the intentional fraud of its agent and for its own illegal policies that facilitated the fraud. No decision of any Alabama court, or of any other court, suggests that this type of conduct by an insurance company is permissible.

2. Petitioner next tries to invoke *BMW v. Gore* by asserting that "the harm caused was solely economic." Pet. Supp. Br. 3. To the contrary, petitioner's fraud threatened respondent — a 50-year-old recent widow of modest means — with the imminent foreclosure of her house, a mobile home that she shared with her 16-year-old daughter. Opp. Cert. 9-11. Only a loan from her attorneys prevented her from losing her home.

In fact, respondent sued for and recovered damages for mental anguish. Thus, an unknown, but surely substantial, portion of the $2 million award before this Court reflects compensation for emotional distress rather than punitive damages. Opp. Cert. 8-12.

3. Petitioner also attempts to attack the ratio between punitive and compensatory damages. Pet. Supp. Br. 3. But because petitioner failed to seek itemization of the components of the damage award at trial (Opp. Cert. 9), the exercise of computing a ratio is purely speculative. Moreover, *BMW v. Gore* suggests that a high ratio between punitive and compensatory damages would be appropriate here, in light of the severe potential harm — loss of her home — that would have befallen respondent but for her attorney's intervention:

> [L]ow awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, *a particularly egregious act has resulted in only a small amount of economic damages*. A higher ratio may also be justified in cases in which the *injury is hard to detect* or the monetary value of noneconomic harm might have been *difficult to determine*.

Slip op. 22-23 (emphasis added). In addition, the essence of fraud is that it is difficult to detect, and a substantial award is necessary to account for the probability of under-enforcement.

4. Petitioner further charges that the award is unreasonable by comparison to legislative penalties. Petitioner compares the award here to the penalty for ordinary consumer fraud under the Alabama Deceptive Trade Practices Act. Pet. Supp. Br. 4. But this statute does not represent "'a legislative judgment concerning appropriate sanctions *for the conduct at issue*.'" *BMW v. Gore*, slip op. at 23 (emphasis added and citation omitted). The Alabama courts have expressed a special concern with the sort of *insurance fraud* at issue here. *See Life Ins. Co. of Georgia*, No. 1940357, 1996 Ala. LEXIS 110, slip op. at *18 (Apr. 23, 1996) ("The class of plaintiffs Life of Georgia preyed upon were from a group of citizens that need the most protection: elderly, uneducated, and low income."). The Alabama courts have not restricted awards in insurances cases to the statutory penalties for ordinary consumer fraud. In fact, they have suggested that no such comparison is apt, for "Alabama citizens who become the victims of fraud have little recourse other than through litigation. . . . [T]he State Insurance Department has little power to regulate agents, and we judicially know that litigation is often the only weapon defrauded citizens have." *Id* at *21.

5. Petitioner has conceded that this case presents no question of extraterritorial punishment. The punitive award against Union Security was based solely on its conduct and solely on its intentional fraud of the Crockers. This case therefore does not involve the principle that a single State may not "impose its own policy choice on neighboring States." *BMW v. Gore*, slip op. at 10.

Petitioner contends that "there is no reason to believe — and petitioner [sic] makes no effort to pretend — that any State other than Alabama" would impose punitive damages on the basis of the conduct at issue here. Pet. Supp. Br. 2. That is simply untrue. Intentional fraud is tortious in every State. And intentional torts have been the basis of punitive damage awards for centuries.

Petitioner's argument is a transparent attempt to distort the facts of this case and to reargue the underlying liability question of state law that was settled by the Alabama courts and which is not before this Court. Moreover, petitioner's argument is inconsistent with *BMW v. Gore*: just as Alabama may not impose its policy choices on other States, so they may not impose their choices on Alabama.

The petition for writ of certiorari should be denied.

Respectfully submitted.

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